

1373



# REPORTS

OF

CASES ARGUED AND DETERMINED

IN

## THE SUPREME COURT

2872 F

OF

THE STATE OF MISSOURI.

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HORATIO M. JONES,  
REPORTER.

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VOL. XXX.

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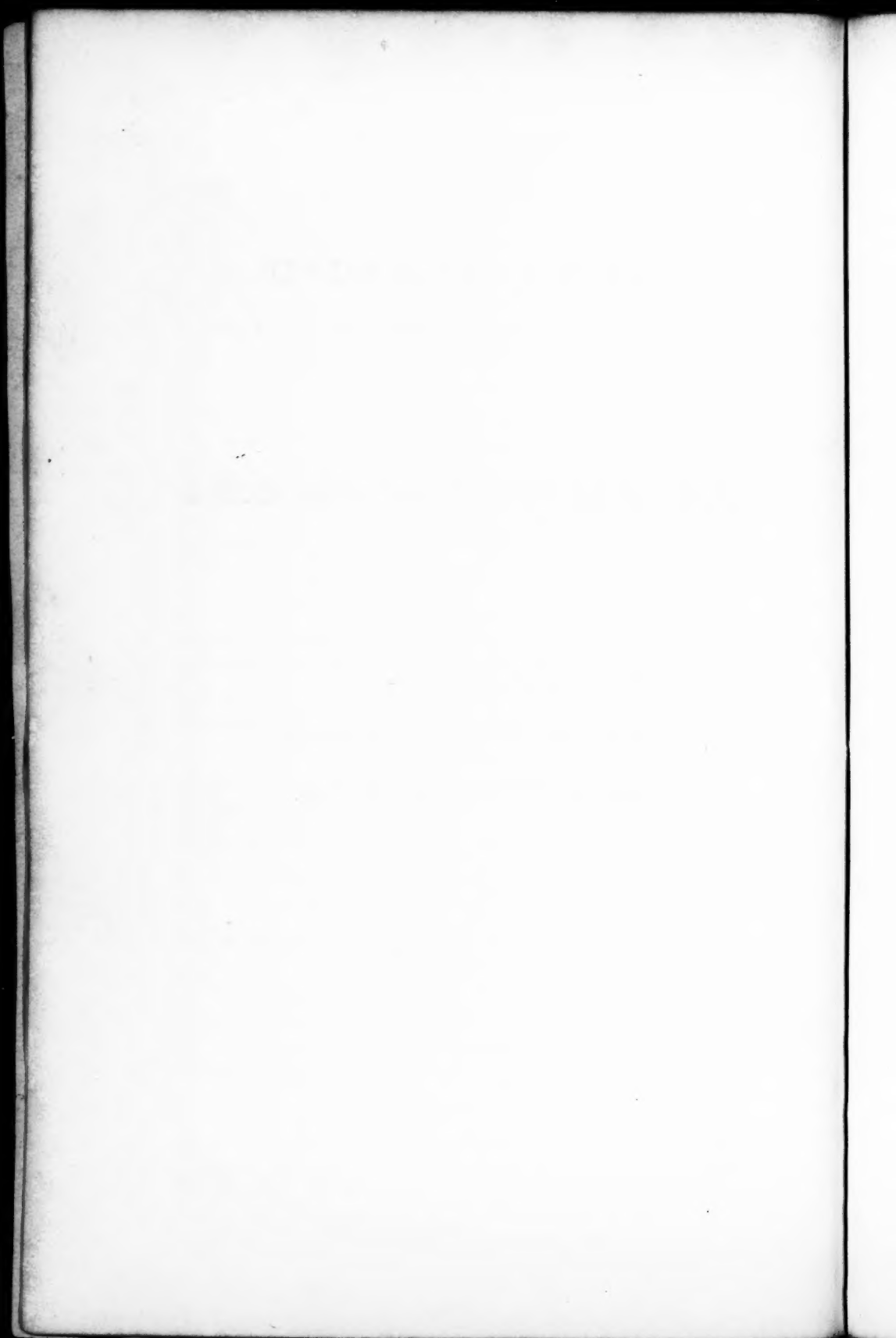
JUDGES OF THE SUPREME COURT OF THE STATE OF  
MISSOURI.

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HON. WILLIAM SCOTT,

HON. WILLIAM B. NAPTON,

HON. EPHRAIM B. EWING.



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CASES  
ARGUED AND DETERMINED  
*Green & Nilsson*  
1867  
THE SUPREME COURT

OF

THE STATE OF MISSOURI,

MARCH TERM, 1860, AT ST. LOUIS.

[CONTINUED FROM VOL. XXIX.]

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THE STATE, Respondent, v. OSTRANDER, Appellant.

1. It is the right and privilege of a jury in a criminal prosecution to determine the facts submitted to them for decision without regard to and uninfluenced by the opinion the judge presiding at the trial may have as to the facts; the judge can not refuse to receive a verdict returned by the jury on the ground that it is manifestly against the evidence.
2. If the verdict returned by a jury in a criminal prosecution be sensible and responsive to the issue, it is the duty of the court to receive it and have it recorded.
3. An affirmative verdict of guilty of murder in the second degree is responsive to an indictment for murder in the first degree; and however strong may be the opinion of the judge that such a verdict is unwarranted by the evidence, and although no instructions whatever may have been given bearing upon the law of murder in the second degree, it would be improper for the judge to refuse to receive such a verdict and order it to be recorded.

*Appeal from St. Louis Criminal Court.*

The defendant, Levi Ostrander, was indicted for the murder of William McCoy. The defendant was put upon his trial upon the indictment, and the trial resulted as set forth

below in the opinion of the court. The defendant was afterwards put upon his trial a second time and convicted of murder in the first degree.

*U. & J. Wright*, for appellant.

I. The court was under a perfect legal obligation to record the verdict rendered by the jury of murder in the second degree. (3 Murph. 571; 1 Hayw. 176.) The court illegally influenced the jury to defeat their verdict. The entire proceeding of the second trial was against the constitution. The court erred in refusing a new trial.

*D. C. Woods*, for appellant.

I. The verdict should have been received and recorded. It was responsive to the issue. (3 Murph. 571; 27 Mo. 380; 22 Mo. 319; 6 Mo. 399.) Where the verdict is merely informal the court may put it in proper form. (13 Mo. 209; 7 Johns. 32; 4 Metc. 354; 9 Dana, 260; 9 Port. 410; 5 Ired. 401; Gilp. 273; 7 Metc. 46.) A new trial will not be granted because the jury does not find as instructed in the law by the court. (1 Sm. & M. 400; 7 Leigh, 751; 18 Mo. 419.) A conviction of murder in the second degree necessarily acquits of murder in the first degree. (27 Mo. 327; 28 Mo. 32.) The court improperly polled the jury of its own motion. (1 Mo. 392; 23 Mo. 579; 2 Gilm. 242; 7 Ired. 27.) "In conclusion, allow me to add that if ever, in the judicial history of Missouri, the court of last resort should interpose to save a fellow-creature from an ignominious death, it is the case at bar. Suffer not the penalty of death to attach to the last finding, for it would be in violation of constitutional right and at war with the great precepts of divine teaching. The first jury went upon the hypothesis that the defendant deserved punishment, but not the penalty of death, for there were many, many palliating circumstances. I regret that the repeated interposition of the lower court shook to ruins the high purposes and mandates of one who had not the manly courage and dignity of character to resist the frowns of the court, after a feeling of consciousness of having

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done right to his fellow-man. I hope this honorable court will pardon me for having spoken thus. Nothing but a high sense of duty drives me to the doing of that that the soul would spurn on ordinary occasions. I can not avoid the internal conviction that, if this man is executed, a great wrong will have been perpetrated. Hence I throw myself into the breach to prevent, if possible, the ignominy of such a crime in the ides of the third quarter of the nineteenth century. Duty tells me stop, for justice will be done, and my client saved from a felon's death. Could I leave him to abler hands or hearts more willing to do their fellow-men justice? Hence I relinquish the prisoner to the hands of the court."

*Mauro*, (circuit attorney,) for the State.

I. The first trial was a mistrial. The record shows this and it can not be impeached. The foreman handed a paper purporting to be a verdict to the judge. It was not received however as such. The jury, being sent back with an additional and proper instruction, returned the same paper as a verdict, and being publicly interrogated, one of them dissented. Before a verdict is publicly received and recorded any juror may dissent therefrom. (*Lawrence v. Stearns*, 11 Pick. 501; 2 J. J. Marsh. 40; *Perry v. Mays*, 2 Baily, 354; 6 Johns. 68; 6 Dane's Abr. 234.) The court had the power, and it was its duty to direct the jury to reconsider their verdict before it was received in open court and recorded, if convinced that there was a palpable mistake. (8 Bac. Abr. 103, tit. G.; 2 Hale, P. C. 310; 3 Park. C. C. 552; 7 Johns. 32; 2 McCord, 209; 3 Murph. 571; 3 Binn. 514; Dyer, 204; 9 Shepley, 453; 4 Comst. 571.) The court was warranted in the belief that the jury had mistaken their powers and duties. It is the duty of the jury to take the law as propounded by the court. (4 Bac. Abr. 397; 7 Mo. 607; 6 Mo. 260; 2 Blach. 151; 2 McCork, 26; 1 Leigh, 588.) Where the evidence leaves no reasonable ground for doubt as to the grade of the offence, the court may direct the jury

to find a general verdict of guilty or not guilty. (17 Georg. 194.) There was but one issue submitted to the jury—guilty or not guilty of murder in the first degree. The subject of murder in the second degree was not discussed by the court; the jury could not consider it. They could not legally know the punishment affixed to the crime, or even its existence in the criminal code. They did not pass upon the issue presented by the court. If the indictment had consisted of several counts charging different offences, and the court had withdrawn from the consideration of the jury all but one count, and the jury, disregarding the action of the court, had found a verdict upon one of the withdrawn counts, certainly the court would be authorized to invite the jury to rectify their mistake before the verdict was assented to and recorded in open court. Such is this case. There was no murder in the second degree in the case. The killing was intentional. (24 Mo. 128.) Had the court instructed upon that degree of homicide, it would have been error. (24 Mo. 475.) There was no lawful provocation; and consequently there was no manslaughter. The pretended verdict never was a verdict. It never did meet with the concurrence of twelve minds.

NAPTON, Judge, delivered the opinion of the court.

The only point arising on this record, which presents any difficulty, is based upon the action of the criminal court upon the verdict, or supposed verdict, of the jury at the first trial. The history of this proceeding will appear from the detailed statement certified by the judge in the bill of exceptions, the material parts of which are here inserted.

“And the jury retired to their room to consider of and concerning their verdict in the premises, and on the following day, the jury in the meanwhile being kept together, came into court, accompanied by the deputy marshal of the county who had in the interim had them in charge, and took their seats in the jury box; and the deputy marshal aforesaid handed to the court the instructions of the court given

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to the jury and a paper, which paper is in the words and figures following, to-wit: 'We, the jury, in the case of The State v. Levi Ostrander, find him guilty of murder in the second degree, and assess his punishment to confinement in the state prison for the term of fifteen years. [Signed] D. M. Branch, foreman;' and the court, having inspected the said paper, handed the same to Mr. Attorney for the State, and to the counsel for the defence for their inspection. And the court then gave the jury the following additional instruction: 'Gentlemen—I instruct you, that if you find the defendant wilfully and intentionally shot and killed deceased with a pistol, there can be no murder in the second degree in the case.' [State v. Phillips & Ross, 24 Mo. 489; State v. Shultz, 25 Mo. 153.] And the court requested the jury to retire and deliberate further of and concerning their verdict in the premises. The defendant objected to the action of the court in sending the jury out again to deliberate upon a verdict they had already rendered, and denied that the jury could find another verdict in the case. Whereupon the jury retired to deliberate further; and after the lapse of some time again returned into court, and the foreman of the jury handed to the court the instructions of the court and the paper above set out signed D. M. Branch, foreman. Whereupon the court asked the jury whether they had yet been able to agree upon a verdict, and the foreman of the jury responded, not otherwise except as they had declared in the paper then held in the hands of the judge, being the paper signed D. M. Branch, foreman. Whereupon the court asked the foreman whether they agreed to render such verdict, referring to the paper signed D. M. Branch, foreman, and the said foreman responded, 'yes.' Whereupon the court told the jury that it was desired by the counsel for the defence, and it would perhaps be more proper, that the verdict should be made responsive to the charge of murder in the first degree, and that their verdict should also declare that they found the defendant not guilty of murder in the first degree, but guilty of murder in the second degree, if such was their

verdict ; and, for the purpose of having the verdict conform to the charge, he would ask them if they found the defendant guilty or not guilty of the charge of murder in the first degree ; and if they found him not guilty of the offence of murder in the first degree, then whether they found him guilty or not guilty of murder in the second degree ; and if they found him guilty of murder in the second degree, would then have the verdict so recorded in due form. And thereupon the court propounded to the foreman of the jury : ‘Gentlemen, how say you ; is the defendant guilty or not guilty of the charge in the indictment of murder in the first degree?’ To which the foreman responded, ‘not guilty of murder in the first degree as charged in the indictment.’ Whereupon one of the jurymen made a remark : ‘That is not my verdict. I am of the opinion that the defendant is guilty of murder in the first degree, but I agreed to the verdict of murder in the second degree as a compromise ;’ and the court here remarked that it had no right to know, and did not want to know, the motives which had led to the formation of their verdict ; what he wished to know, and what he inquired of the jury, was whether they found the defendant not guilty of murder in the first degree, since they had found him guilty only of murder in the second degree ; and again asked them : ‘Do you find the defendant not guilty of murder in the first degree?’ to which the foreman responded, ‘yea ;’ and the other jurymen responded, ‘nay.’ The court informed the jury that the verdict of guilty of murder in the second degree, by necessary implication, found the defendant not guilty of murder in the first degree ; [State v. Ball, 27 Mo. 327 ;] and asked the jury again whether they would find the defendant not guilty of murder in the first degree, and the same result was had as before—the foreman answering, it was the verdict ; and the other jurymen alluded to, it was not his verdict, and he could not agree to it. Whereupon the court abandoned as a hopeless effort to attempt to obtain from the jury a verdict as to whether defendant was or was not guilty of murder in the first degree, and remarked to the jury that

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if they agreed to render a verdict of murder in the second degree, he would receive it; and asked the jury if they agreed upon and would render that verdict, and asked the jury: 'Gentlemen, do you find the defendant guilty of murder in the second degree;' and the foreman responded, he could not answer that; the action of the other jurymen had placed him in a very absurd position, as that when he wrote and signed that verdict he was authorized so to do for himself and fellows, but that for himself such was his verdict; and the other jurymen alluded to remarked that the verdict of guilty of murder in the second degree was not his verdict; and that he did not agree to it, and could not and would not make such a verdict; that he was of opinion that the defendant was guilty of murder in the first degree. And the court, after further conversation with the jury with reference to the necessity of their agreeing to a verdict if possible, and with reference to the probability of their being able to agree upon a verdict, and the court being of opinion that there was no probability of the agreement of the jury, and being assured by divers of the jury that there was an impossibility of the jury's agreeing, and the court so believing, from the matters aforesaid, as well as from the manifest temper of the body, that the jury could not agree upon a verdict on the matter, discharged the jury from a further consideration of the case, and a mistrial was the result."

Our state constitution provides that the right of trial by jury shall remain inviolate, and that, in all criminal prosecutions, the accused has the right to a speedy trial by an impartial jury of the vicinage. This bill of rights, contained in the tenth article of the constitution, declares further that "no person, after having been once acquitted by a jury, can for the same offence be again put in jeopardy of life or limb." In the spirit of these constitutional provisions the legislature has passed laws marking, with great exactness, the line separating the power and duties of the judge from those assigned by the constitution and the laws to the jury. The right of a jury, in a criminal prosecution, to determine the facts, with-

out regard to the views of the judge who presides at and conducts the trial, is secured by the most stringent enactments. The judge is confined to an exposition of the law; he is not permitted, "on the trial of the issue on any indictment, to sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested so to do by the prosecuting attorney and the defendant or his counsel;" and his instructions upon points of law are required to be in writing. (R. C. 1855, Practice, art. 6, § 31.)

These constitutional and legislative provisions are manifestly repugnant to some ancient usages, which are said to have prevailed, to have been tolerated, if not sanctioned, in the conduct of criminal trials in England. Bacon says: "It is said that after a jury have given a verdict of not guilty in an indictment for felony, the judge may, if the verdict be in his opinion contrary to clear and full evidence, send them out again to reconsider their verdict." (Bac. Abr. tit. Verdict, G.) Hawkins says, "It hath been adjudged that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again and reconsider the matter; but this is by many thought hard, and seems not of late years to have been so frequently practiced as formerly." (2 Hawk. P. C. ch. 47, § 11.)

It is scarcely necessary to observe that the power over verdicts attributed by these authors to the judges in England is not recognized or sanctioned by any law or usage here. Such powers as these would be entirely incompatible with that constitutional protection which a verdict of acquittal gives to a prisoner. If the criminal judge may refuse to receive a verdict in a criminal case because it is manifestly against the evidence, the judge must, of course and from necessity, be authorized to determine the questions of fact for himself, so that his opinion of the facts and not the opinion of the jury must ultimately prevail. What becomes of the constitutional guaranty of a verdict of acquittal, if the judge may refuse to receive or record the verdict, because in his opinion it is against evidence?

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Sir Matthew Hale expounds the law somewhat differently from Hawkins and Bacon on this point. He goes no farther than to say that "if the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again and consider better of it, and alter what they have delivered." (Hale P. C. p. 310.) And Chitty, following Hale, says, that "if the jury, through partiality or mistake, deliver an improper verdict, the court may, before it is recorded, desire them to reconsider it, and recommend an alteration." This language is so loose and general that it hardly needs any particular criticism in connection with the particular history of the case we have under consideration. It is not necessary for us to inquire how far and up to what times mistakes may be corrected by jurors. These positions of Hale and Chitty are based upon the authority of Plowden, who is also referred to by Bacon and Hawkins. The case in Plowden (*Saunders v. Freeman*, Plow. C. 209) is not a criminal proceeding, and therefore has really nothing to do with the principle asserted as applicable to criminal trials. It was a case where the jury rendered a privy verdict, and afterwards in open court changed it; and the verdict delivered in open court was sustained. In the course of the decision, it was incidentally said by the court of Crown's Bench that, "even in court, if the jury pronounce a verdict, they may change it, if they have mistaken it, or if it was not full in law, or for any other reasonable cause immediately perceived; for it was said in the Lord Chief Justice Montagu's time, one Archer was arraigned in the King's Bench for felony of the death of a man, and the jury gave their verdict not guilty; and presently after they said they had mistaken themselves, and they said he was guilty; and this last was received and entered as the verdict. And in 11 Henry 4th, in conspiracy against two, the inquest found one guilty; and it was there said that their verdict was contrary to itself, for a conspiracy can not be but between two at least; and if the one is not guilty, the other is not guilty; for which reason they were sent back and af-

terwards they came again and said that both were guilty, and this was received as their verdict."

Now it is obvious that the instances put by the judges in Plowden, whether they would be allowed in England at this day or not, do not form any precedent for the course of proceeding taken in the criminal court of St. Louis. Upon the bringing in of the verdict here, there was no suggestion by the jury, or any one of them, that any mistake was made; nor do any of the subsequent developments show that there was any mistake or misunderstanding as to the verdict agreed upon. And in relation to the conspiracy case, the judges said the verdict was "contrary to itself;" that it was contradictory, repugnant, and therefore insensible. One man could not be convicted of conspiracy; therefore the acquittal of one was virtually the acquittal of the other. The verdict we are considering is not subject to any objection like this; but if it was, we are not prepared to say that such a power could be exercised here as was exercised in the conspiracy case in England. Chitty says: "This is considered as bearing too hard on the prisoner, and has been seldom done in modern times, when the decision is in his favor." Chief Justice Taylor, of North Carolina, very properly observes on this conspiracy case cited in Plowden and commented on by Chitty: "Some of the harsh rules of the common law, in relation to criminal trials, have been gradually softened by the improved spirit of the times; and this, among others, is relaxed in modern practice, where the jury bring in a verdict of acquittal. It is considered as bearing too hard on the prisoner and is seldom practiced. I think this course of proceeding is fit to be imitated here, whenever a prisoner, either in terms or effect, is acquitted by the jury, and that in all such cases the verdict should be recorded." (State v. Arrington, 3 Murph. 573.)

The result of the authorities, in modern times at least, seems to be, that, when in a criminal trial a verdict is returned which is sensible and essentially responsive to the issue, the court has no other duty to perform in reference

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State v. Ostrander.

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to its reception except to have it recorded. According to ancient customs in England, and one which prevails in many circuits in this state—a very laudable and safe one—the clerk reads over the verdict to the jury, and calls their attention to it thus: “Gentlemen of the jury, hearken to your verdict while the court records it. You say, &c., &c., and so say you all.” This is the time for the correction of mistakes, if any have been made, and this is the mode in which it should be done. (*Regina v. Vodden*, 6 Cox. C. C. 226; 1 Bennett & Heard, Lea. C. C. 547.)

If these principles be correct, we do not think there can be any question that the criminal court was wrong in giving the instruction which was given after the verdict came in and sending the jury back to reconsider their verdict. We do not speak of the propriety or impropriety of the instruction as an expression of opinion on the part of the court in reference to a point of law; nor do we consider it of any consequence that the opinion of the court upon the facts was right, and that of the jury wrong. We suppose that only one interpretation could be placed upon the instruction, which the court gave after the verdict was rendered, by the jury or by any one else. It was certainly not the enunciation of any new principle of law which had escaped the attention of the court when the instructions applicable to the case generally were given; on the contrary, it was a mere repetition, substantially, if not in precise language, of the law which the court had already declared to the jury. The instruction was intended, we suppose, and must have been so understood by the jury, as an intimation to them that the verdict was not, in the opinion of the court, warranted by the testimony. The language of the court was: “Gentlemen, I instruct you that if you find that the defendant wilfully and intentionally shot and killed the deceased with a pistol, there can be no murder in the second degree in the case.” The verdict brought in by the jury was a conviction of murder in the second degree, with a specification of the punishment. The court was of opinion that where the killing was wilful and inten-

tional, the offence would not and could not be murder in the second degree; and as in such cases usually, and in this case particularly, the question of accident or design was not left at all doubtful by the evidence, the court concluded that the verdict was wrong, and therefore called the attention of the jury to it, that they might alter it. We do not consider it important to inquire here whether the court was right or wrong in the conclusions arrived at, either of law or fact; nor whether the result of the action of the court in this particular case did not tend to the administration of justice. We regard it as solely a question of principle—a determination of the true line of demarkation between the court and the jury. As such, it is important; and it would be dangerous and unsafe to allow a departure from fixed principles in criminal trials. Although the result in this case may be, abstractly considered, right; although the prisoner may justly merit the punishment pronounced by the second verdict and final judgment of the court upon that verdict, yet the power exercised here to bring about this result may be exercised in other cases bearing a very different aspect. If the power does not exist, if it is substantially inconsistent with our constitution and laws, it ought not to be exercised in any case. There is no doubt that the verdict was one which was responsive to the issues in the case; that it was a verdict therefore which the jury were competent to find, and that it was sufficiently formal to authorize a judgment on it, under the repeated decisions of this court. It was a verdict of murder in the second degree, and therefore by implication an acquittal of murder in the first degree. After the court had submitted the verdict to the counsel for the State and for the prisoner and no objections were suggested to it, there remained nothing but to have it read to the jury and ascertain whether it was assented to by all the jurors. In the absence of any dissent, their assent would be presumed and the verdict recorded.

So far, we have considered the case up to the period when the jury retired a second time at the order of the court with

an instruction. The subsequent events of the trial undoubtedly present questions of more difficulty. It seems that the jury returned a second time with the same verdict. At this stage of the proceedings, the jury were told by the court that it was desired by the counsel for the defence, and was perhaps proper, that their verdict should respond formally to the charge of murder in the first degree; that it should in terms declare that they found the prisoner not guilty of murder in the first degree, but guilty of murder in the second degree if such was the verdict; and with a view to ascertain whether such was their verdict, the court proceeded to ask the jury, if they found the prisoner guilty or not guilty of murder in the first degree? To this interrogatory the foreman responded, "not guilty of murder in the first degree;" but one of the jurymen said that was not his verdict; that his opinion *then* was that the defendant *was* guilty of murder in the first degree, and that he had agreed to the verdict originally found as a compromise. Subsequent conversations between the court and the jury more clearly showed the dissatisfaction of the juror with the verdict and the result was a mistrial.

Had this result occurred immediately upon the bringing in of the verdict, and upon the interposition of the defendant's attorney, and without any interference on the part of the court, the case would have presented a very different appearance. But we must look at the condition of the case as it stood at the rendition of the verdict. Was the verdict responsive to the issues, consistent with itself, sensible and capable of sustaining a judgment? If it was, why the delay in recording it? If the delay in having it recorded, the instruction of the court, the remanding of the jury and the subsequent conversations between the court and the jury had any influence in shaking the first determination of the jury, can the result, with any propriety, be regarded as a mistrial?

It is obvious that a court, by calling a verdict a paper, can can not change its real character; and it would seem to be

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equally clear that a verdict, sufficient in itself and acquiesced in by the jury at the time it is rendered, can not be impaired by any delay in having it recorded. The intimation of a court, after the rendition of a verdict, of its impropriety upon the facts in evidence, will have weight with a jury. It is impossible to say that the opinion, evincing a plain dissatisfaction with the verdict, had no influence in producing the vacillation of the juror who ultimately dissented. As we have already said, we do not differ with the court upon the law as declared in the instruction, nor do we deem it necessary to express any dissent from the conclusion on the facts which the criminal court seems to have reached; nor have we any doubt that the object of the court was to promote the ends of justice. The result attained may be more in accordance with the demands of this particular case than could be reached by entering a judgment on the original verdict. But we are of opinion that after the verdict was rendered, the subsequent instruction and remanding of the jury were erroneous, and that the error was not cured or waived by the interposition of the defendant's counsel.

We shall, therefore, reverse the judgment and direct the verdict to be recorded. The criminal court will, of course, make the necessary changes in the record to conform it to the facts as certified in the bill of exceptions.

Judge Ewing concurs.

SCOTT, Judge, is in favor of affirming the judgment of the court below.

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THE STATE, Respondent, v. RAMELSBURG, Appellant.

1. Stealing committed in a dwelling-house is grand larceny irrespective of the value of the property stolen, and may be punished as such under the thirty-second section of the third article of the act concerning crimes and punishments. (R. C. 1855, p. 577.)

*Appeal from St. Louis Criminal Court.*

This cause was submitted to the jury upon the following among other instructions: "The distinction between grand and petit larceny lies in the value of the property stolen. Petit larceny is the larceny of goods under the value of ten dollars, and grand larceny is the larceny of property of the value of ten dollars and upwards; but property stolen from a dwelling-house is the subject of grand larceny without regard to value, if of any value."

*Wingate*, for appellant.

*Mauro*, (circuit attorney,) for the State.

I. Larceny committed in a dwelling-house is grand larceny without regard to the value of the article stolen. The section specifies no other punishment than imprisonment in the penitentiary. "May" is to be construed as "must or shall." (Sedw. on Stat. Law, 438; 9 Part. 390; 1 Pet. 64; 9 How. 248; 4 Gilm. 29; 7 Ind. 122.)

SCOTT, Judge, delivered the opinion of the court.

The defendant was arraigned on an indictment for stealing in a dwelling-house. He was found guilty and sentenced to the penitentiary.

The question raised on the trial was, whether, if personal property of less value than ten dollars is stolen in a dwelling-house, the thief can be convicted under the thirty-second section of the third article of the act concerning crimes and their punishments, which provides that if any larceny be committed in a dwelling-house or in any boat or vessel, or by stealing from the person in the night time, the offender may be punished by imprisonment in the penitentiary not exceeding ten years. The twenty-fifth section of the same article makes the stealing of personal property of the value of ten dollars and more grand larceny, which is punishable by imprisonment in the penitentiary. The thirty-first section, which immediately precedes that under which the de-

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fendant was tried, makes stealing of personal property under the value of ten dollars petit larceny, an offence punishable by fine and imprisonment in the county jail.

As the section under which this indictment was framed immediately follows that defining petit larceny, and as the statute declares that if "any larceny" be committed in a dwelling-house, the offender shall be punished "by imprisonment in the penitentiary," it is obvious that the section embraces both grand and petit larceny. The same offence may be committed under circumstances which will greatly enhance its guilt. Property which is necessarily exposed to the depredations of offenders must be protected by severer punishment than that which may be guarded and protected. So those who would make a visit to a dwelling-house a screen to hide a theft, should be punished more severely than one who would steal the same thing found in a place calculated to create a temptation to do the act. The one act is indicative of a much more depraved disposition in the offender than the other. The judgment is affirmed. Judge Ewing concurs; Judge Napton absent.

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LINDELL *et al.*, Respondents, v. McLAUGHLIN *et al.*, Appellants.

1. There may be an *estoppel in pais* as to the boundary line between two adjoining proprietors although no express agreement may have been made between them as to the location actually made; nor is it essential that the proprietor claiming the benefit of the estoppel should enclose up to the line; it is sufficient, if it would work a practical fraud upon him, to allow the other to disturb a location made, and acquiesced in, by himself.
2. The doctrine that possession of part is possession of the whole is inapplicable to such a case.

*Appeal from St. Louis Land Court.*

The facts in evidence in this cause sufficiently appear in the opinion of the court.

The following are the instructions given for the plaintiffs

alluded to below in the opinion of the court: "1. If the jury find from the evidence that the land in dispute is embraced within the tract claimed by the plaintiffs under Fry as described in the deed given in evidence, and if they find that under that deed and immediately following its date, down to the commencement of this suit, the plaintiffs had actual possession, by enclosure of the greater part of the tract, claiming the whole tract, the law imputes to them the possession of the whole tract, though part of it may be beyond the enclosure; and that possession is good as against the defendants unless they prove open, notorious, actual, adverse possession in themselves or another, for twenty consecutive years prior to the commencement of this suit. 2. The fence, in order to become an estoppel to plaintiffs' action, must have been built as a dividing fence between Fry and Lucas, or between plaintiffs and Lucas, and must have been mutually agreed upon as such between the plaintiffs and Lucas or Fry and Lucas, and the burden of proving said facts is upon the defendants. If the plaintiffs built their fence to enclose their land in whole or in part, and, by accident or mistake as to their true lines, left out a part thereof on the west to which they had a title by deed, such fence and the building thereof by plaintiffs, and the possession of the land so fenced, form no estoppel against the plaintiffs claiming and recovering their true lines in this suit according to their deed. 3. If a party, in enclosing his land, erroneously or mistakenly leaves out of his enclosure a portion thereof, this is no evidence of any estoppel to bar him from claiming according to the extent of his true title. 4. The taxes paid by James H. Lucas, the tax receipts therefor, and the entries in the assessor's books of the lands assessed to the Lindells adjoining the premises in question, are not any evidence affecting the title to the premises in question, and are not any evidence of estoppel against the claim of the plaintiffs to the premises in question in this suit. 5. The verbal declarations of the plaintiffs, or either of them, as to the extent of their tract, made to any other person than John B.

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C. Lucas or James H. Lucas, are wholly inadmissible to affect the question of title or boundary to the premises in question, and the jury is instructed to disregard the same. Such verbal declarations do not in any manner estop the plaintiffs from claiming the true lines of their tract. 6. If the jury find for the plaintiffs they will also assess as damages against the defendants the rents and profits of the premises in question from the time of the commencement of this suit and the monthly value of the rents and profits thereof."

*Glover & Richardson*, for appellants.

I. There was clearly an estoppel *in pais*. All the elements constituting an estoppel *in pais* exist. 1st, an admission inconsistent with the claims offered to be set up; 2d, action by the other party upon such admission; 3d, an injury by the withdrawal of the admission. The first instruction was calculated to mislead the jury. The question of time did not enter into the case. The verbal declarations were improperly ruled out by the instruction No. 5. The instruction given was erroneous. (1 Greenl. Ev. § 207; 26 Verm. 373; 7 Cow. 762; 12 Wend. 423; 7 Johns. 238; 9 Barb. 618.) It is not necessary that there should be an express agreement. (12 Wend. 130; 18 Wend. 157; 9 Johns. 99; 11 Johns. 122; 16 Mo. 273.)

*B. A. Hill*, for respondents.

NAPTON, Judge, delivered the opinion of the court.

The instructions given for the plaintiffs in this case were not, in our judgment, calculated to lead to a proper adjustment of the controversy.

The first instruction is a mere abstraction, outside of the facts in evidence, and tending to throw no light upon the questions really contested. The legal principle asserted is undoubtedly correct, but it has a tendency to withdraw the investigations of the jury from the defence which is relied on. The case was not one of a proprietor taking possession

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of a part of his tract and claiming the whole. The case attempted to be made out by the defendants was of an indisputed possession of the plaintiffs, of what they supposed to be their whole tract, and an entire absence of any claim to anything outside of their actual enclosure. Whether the plaintiffs were entitled to go beyond their enclosure and claim and recover according to their lines as designated in their deed, under the circumstances and facts in evidence, was the point to be determined, and the instruction furnishes no guide to the determination of this question.

The second instruction is directed to the questions at issue, and the general proposition asserted in its first clause may be conceded to be correct. The objection to this instruction, as well as to the three instructions which immediately follow, is, that they select detached facts, and pronounce each separate fact insufficient in law to sustain the defence, without determining upon their effect as a whole and continuous, connected transaction.

To understand the points of law presented by the record, it is necessary to refer to the main facts, which appear to be these. Jeremiah Conner may be considered the original owner of the common field lot or forty arpent lot, concerning a portion of which this dispute has arisen. In November, 1821, Conner conveyed the west half of this lot to Col. O'Fallon, and in June, 1824, the east half was conveyed to one Fry, who immediately took possession of his half and enclosed it. The plaintiffs purchased from Fry's administrator in 1825 or 1826, and a deed was made to them in 1827. In 1828 or 1829 they put up in place of Fry's fence a more substantial and permanent enclosure, made of posts and rails—the posts being of cedar. In 1824, O'Fallon conveyed one arpent on the east end of his half of the forty arpent tract to Judge Lucas—the sale having been made a year or two before this. O'Fallon conveyed to the Finneys about ten arpens in 1831, west of and adjoining to the one arpent previously sold to Lucas. The sale to the Finneys had taken place two years before the deed was made, and they had en-

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closed their land as early as 1829. All these sales and locations under them, by O'Fallon to Lucas and the Finneys and to others, were made with reference to the western fence of the plaintiffs as being the true division line of the tract. More accurate surveys, however, made before this suit was instituted, showed that the original tract contained more than forty arpens; that Fry's division line or fence, adopted by the plaintiffs, was nearly two arpens east of the true division line, although it was twenty arpens west of the eastern line of the tract. The arpent purchased by Lucas, now the subject of this suit, was never enclosed by him or by his representatives, but the lot purchased by the Finneys and located just one arpent from the western fence of the plaintiffs was not only enclosed, but was covered by large and valuable improvements made long before this suit was brought; and such was also the case with reference to portions of O'Fallon's half of the tract west of the Finneys. Judge Lucas had exercised such acts of ownership over the vacant space of ground between the plaintiffs and the Finneys as paying the taxes on it, causing the ravines on it to be filled up, protecting it from nuisances. It was immediately in front of his residence and formed an open passway from his gate to the old St. Charles road. The lot was purchased by him as an outlet to this road—as stated by Col. O'Fallon, his vendor—and the lines were pointed out to him by O'Fallon. There was no evidence of any personal communication between the plaintiffs or Fry and O'Fallon, Lucas or the Finneys relative to these lines. There was evidence to show that the plaintiffs were perfectly aware of Lucas' claim to the vacant arpent.

Upon this state of facts, it is apparent that the mistake made in the original survey, or practical location of the plaintiffs' lot, has occasioned a loss of one arpent or more to the plaintiffs or the defendant; and the question substantially is, who must bear this loss?

In *Rockwell v. Adams*, 7 Cow. 761, it was said: "It is not necessary, in order to make an actual practical location

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control the courses and distances in a deed, that the party making such location, or subsequently recognizing it, should, in all cases, know that the effect of it would be to give him less land than he would otherwise be entitled to; nor that there should be an express agreement to abide by such line. An acquiescence for a length of time is evidence of such agreement. Where the line has been acquiesced in for a great number of years by all the parties interested, it is conclusive evidence of an agreement to that line." This case was before the supreme court again in 6 Wend. 469, and finally settled by the court of errors in 16 Wend., where the chancellor intimates, as a proper modification of the original opinions of the supreme court, that the length of time during which the acquiescence must continue ought to be such as would bar a right of entry under the statute of limitations; or there should be an express or implied agreement to the erroneous line; or the cause must be one in which a correction of the line would result in great injustice to the party acquiescing, brought about by the conduct and language of the party making the erroneous location.

In Dibble v. Rogers, 13 Wend. 539, it is said that long acquiescence in an erroneous location would authorize the jury to find that the plaintiff had agreed to a location different from that given by his deed; and, whether he knew his rights or not, such location and acquiescence would conclude him.

The plain and simple principle of natural equity, which lies at the foundation of these New York decisions and constitutes, in truth, the main reason for the various modifications of what have been termed estoppels *in pais*, is that, where a man misleads another by his acts or words, so as to occasion an expenditure of money on the part of the latter, the former will not be allowed to change his assertions or claims to the detriment of the person misled. It is a practical fraud, although no fraud may be intended, to permit this to be done.

Two circumstances in the present case seem to be relied

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on to preclude the defendants from the benefit of the estoppel set up—the absence of any express agreement between the plaintiffs and Lucas concerning the line, and the fact that Lucas never enclosed his lot.

In what respect would proof of a positive agreement, between Lucas and the plaintiffs, as to the erroneous division line between them, have altered the case? If the plaintiffs fixed the line and the defendants acquiesced in it, how could the plaintiffs bind themselves more effectually? A positive agreement might place the defendants under stronger obligations to abide by the line if it had been their interest to disturb it, but it is hard to see how the plaintiffs could do more than they have done. If they had communicated with Judge Lucas in person and informed him of what they had done, and their reasons for so doing, and pointed out the fence on the western end of the enclosure as their line, would the case have been at all changed in any material point? A man's actions are generally more relied on than his declarations.

It would be strange if the failure of Judge Lucas to enclose this ground, purchased as it seems to have been for the very purpose of being left open, should have the effect of depriving his representatives of a defence to which, under other circumstances, they might be entitled. We, of course, have no reference to the effect which an enclosure by a fence would have had upon the case considered with respect to the statute of limitations. We are considering the case solely with reference to the effect of the acts and declarations of the plaintiffs upon the defendant's rights. In this point of view, of what use would a fence have been to Lucas? How would the case have been altered? The only purpose a fence or enclosure could serve would be to apprise the Lindells that he (Lucas) claimed the lot. But may not the knowledge of the defendants of this fact be proved by other circumstances as well?

The fact which, in our judgment, has the most significant bearing upon the decision of this case, is the total loss of the

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entire lot to Lucas' representatives, which inevitably results from the correction of the division line now. Undoubtedly such a result, if fairly attributable to any act or negligence of Lucas and not produced by any conduct on the part of the Lindells or their vendor, could not and ought not to be remedied by doing injustice to the plaintiffs. But if this line was established by the Lindells, or by Fry, their vendor, nearly thirty years before the institution of this suit; if O'Fallon and his vendees were governed in their locations and improvements by this line; if a change of the line now is to have the effect of destroying Lucas' title entirely, and but for the statute of limitations producing heavy losses to all the purchasers under O'Fallon of the west half of the tract, what injustice is there in confining the plaintiffs to a line fixed by themselves and acquiesced in by all parties for a period exceeding that required by the statute of limitations to give title?

The judgment is reversed and the case remanded. The other judges concur.



WILLARD, Respondent, v. MILLERS' AND MANUFACTURERS' INSURANCE COMPANY, Appellant.

1. Where the freight list of a steamboat on a proposed trip or voyage is insured against a total loss only, the policy will cover the freight pending at the time of loss, although some freight may have been previously earned by the delivery of goods at intermediate ports.
2. If a steamboat, whose freight list is insured against a total loss only, meets with a disaster upon the contemplated trip, and can not be repaired in a reasonable time to transport the cargo, and the master is unable to send the cargo forward to its place of destination for a sum less than the original freight, there will be a total loss on freight within the meaning of the policy.

*Appeal from St. Louis Court of Common Pleas.*

This case has heretofore been before the supreme court. (See 24 Mo. 561.) It was a suit on a policy of insurance against a "total loss only" on the freight list of the steam-

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boat Cataract on a trip from St. Louis to New Orleans. The defence was that the loss was not total ; that *pro rata* freight had been received by the plaintiff. The boat descending the river struck a snag about one hundred and forty miles below St. Louis and was badly damaged. A large part of the cargo was put upon the bank, a part was sent forward to Cairo by another boat, and the boat returned to St. Louis with the remainder. A portion of the goods thus brought back was put up at auction by the agent of the underwriters, and out of the proceeds of the sale the agent handed over to the plaintiff between four hundred and five hundred dollars. This, it is claimed, was received as freight *pro rata*.

The court gave the following instructions, at the instance of plaintiff: "1. Even though the jury may believe that after the injury to the Cataract, plaintiff could have procured or did procure another boat to transport the said cargo to the port of destination, this fact constitutes no bar to his right to recover in this action. And if the jury find that by such injury to the Cataract, she was so injured and disabled that she could not pursue her said voyage, and could not with ordinary exertions have been repaired in a reasonable time, so as to pursue her voyage with said freight, this was a breaking up of said voyage. 2. If the jury find for the plaintiff, they will assess the damages which they believe from the evidence have been sustained, and they may find interest also on such amount from the time of the commencement of the suit."

The defendant asked the court to give the jury the following instructions, all of which the court refused: "1. That it is necessary, in order that there should be a recovery by the plaintiff on the policy in this action, that there should have been a total loss of freight. 2. If the plaintiff has received any sum by way of *pro rata* freight on the cargo for the voyage, he can not recover. 3. If the jury find that the plaintiff has received full freight on any part of the cargo for the whole voyage, he can not recover. 4. The receipt by the

plaintiff of any sum of money towards the freight list insured, for the voyage insured against, converts the loss from a total into a partial one; and if the loss were partial and not total, the plaintiff can not recover. 5. If the vessel containing the cargo of which the freight was insured could have been repaired in time to resume and complete the voyage insured upon before the cargo would have been so deteriorated by the retardation or delay of the voyage as to render it incapable of earning freight, the plaintiff can not recover. 6. The cargo would not have been incapable of earning freight so long as it remained specifically the same, and of greater value than the sum to be paid as freight thereon. 7. The cargo would not be incapable of earning freight so long as any part thereof remained specifically the same, and of the same or greater value than the sum to be paid as freight thereon. 8. If the cargo, upon the injury to the Cataract, could have been transferred and sent forward to its destination for a less sum than the amount of freight for the whole voyage from St. Louis to New Orleans, but the master of the Cataract, from whatever cause, failed or neglected to send it forward, then he is not entitled to charge the underwriters as for a total loss of freight, and the jury must find for the defendant, even although they may find that according to the arrangement actually made for sending the cargo forward, a sum equal to or greater than the original freight was agreed to be paid to the boat taking the cargo from Devil's Island to New Orleans. 9. If the loss of freight sustained by the plaintiff has been partial only, and not total, the plaintiff can not recover."

*Gantt*, for appellant.

I. All idea of liability for merely partial loss was excluded by the policy. It must be an actual total loss. (24 Mo. 566; 8 Cranch, 47; 2 Phill. § 1766-7, 1756.) The freight list of a vessel is an entire thing. The failure to earn *any* freight is necessary to constitute a total loss of freight. The

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loss in the present case was only partial. (6 Taunt. 383; Marsh, 226; 3 Sumn. 221; 3 Johns. Cas. 93; 1 Johns. 205; 3 Johns. 321; 2 Pick. 104; 23 Pick. 405; 2 Phill. on Ins. § 1438-9, 1440, 1450, 1633-9, 1640-3, 1767; 2 Maule & S. 278, 371; 3 Caines, 108; 3 Sumn. 221; 7 East, 38; 2 Marsh. R. 432; 7 Taunt. 154; 3 Wash. C. C. 256; 8 Cranch, 39; 2 Louis. 432; 5 M. & S. 47; 16 East, 214; 3 Mas. 429; 1 Sto. 342; 14 Johns. 138; 9 Johns. 9; 2 Duer, 204; 24 Mo. 561.) If a vessel be damaged, but is repairable so as to be able to complete her voyage in a reasonable time and so earn freight, the master is bound to do this, and if he fail to do this the underwriter is discharged. The court erred in refusing the instructions asked.

*Hudson & Thomas*, for respondent.

I. The breaking up of the voyage amounted to a total loss on freight. (3 Phill. on Ins. § 1142, 1630, 1485; 3 Johns. Cas. 93.) The fact that some *pro rata* freight money was received does not affect the question of a total loss. It was in the nature of salvage. (2 Phill. on Ins. § 1630-3; 15 Mass. 345; 24 Mo. 561.)

NAPTON, Judge, delivered the opinion of the court.

This case was before this court in 1857 and the decision of the court is reported in 24 Mo. 561. Two of the present judges were not then on the bench, and it is proposed now to state the conclusions to which they have arrived upon the points presented by the record.

It is stated in Phillips on Insurance that "an indefinite detention of the ship, or one for so long a period as to break up the voyage, is a total loss of freight." The same author defines a partial loss of freight to be occasioned "by the loss of the ship after a part of the voyage is performed, which makes it necessary to hire another ship to carry on the cargo to the port of destination in order to earn freight;" and he

says further that "when freight *pro rata* is earned this is a case of partial loss." (§ 1440.)

If the voyage is entirely broken up by the loss of all the goods, or by the destruction of the vessel, or by its incapacity to perform the voyage occasioned by any of the perils insured against and the impracticability of sending the goods on in another vessel on such terms as would enable *pro rata* freight to be earned, the loss is total. Marshall, in his work on Insurance, says: If, by any accident or misfortune, the ship be prevented from proceeding on her voyage, and the voyage be thereby lost, this is a total loss, not only of the ship and freight, but also of the cargo, if no other ship can be procured to carry it to its port of destination." (2 Marsh. on Ins. 585.) In *Manning vs. Neunham*, 2 Campb. 624, a case since regarded as having gone too far in favor of the assured, Lord Mansfield is reported to have said: "If by the perils insured against the voyage be lost and gone, it is a total loss, otherwise not. The ship received an irreparable hurt, within the policy, which drove her back to Tortola, where only two ships could be had, both together not capable of taking the whole of the cargo on board. The voyage was so completely lost, that no ship could be got, and the insured were unable to send that part of the goods which they had purchased forward to England, and yet nobody bought but to send to England. *If the voyage could have been continued in another ship, there might have been freight pro rata.* But it was admitted that there was a total loss on the freight, because the ship could not perform her voyage, and the insured were not to wait till ships could be had."

In a work on insurance by Arnould, a total loss of freight is thus defined. "If the freight insured be the hire of a ship for an entire voyage, under the terms of a charter party, so that no freight is payable except on the arrival of that particular ship at the port of destination outward, or at the home port, then if such arrival of the ship be rendered impossible or hopeless, either by her foundering at sea, or being just-

fiably sold as irreparable in the course of the voyage, this ought, on principle, to be an absolute total loss of freight, quite irrespective of all questions as to the state of the cargo. Where, on the other hand, the earning of the freight insured is not thus made to depend on the arrival of the ship under the charter party, but on the delivery of the goods according to the terms of the bill of lading, the chance of the ship's arrival would seem to be less important, as the criterion of the right to recover a total loss on freight without notice of abandonment, than the chance that the goods may be forwarded so as to earn freight by another ship; in such cases, accordingly, if, although the original ship be wholly destroyed or justifiably sold as irreparable, yet the cargo is preserved in such a state that it may be sent on, so as to earn freight, by a substituted ship, it would seem that the assured, in order to recover as for a total loss on freight, ought on principle to give notice of abandonment." (2 Arnould on Ins. 1043.)

We understand these authorities to maintain that where a part of the voyage has been performed and the master sends on the goods by another ship at a price less than the whole freight, then *freight pro rata* is earned and the loss is only a partial one; or where the shippers receive the goods at the place where the ship is disabled, paying *pro rata* freight, the loss is only a partial one. (Everth et al. v. Smith, 2 M. & S. 278; Hunt v. Royal Ex. Co. 5 M. & S. 47; McCarthy v. Abel, 5 East, 388.)

But it does not follow from these positions that the earning of any freight discharges a policy which protects against total loss only. If such a construction was necessary, it is plain that a clause of this kind in our river policies would make them perfectly useless as indemnities. There is hardly a boat engaged in the navigation of our western rivers but trades with a great many intermediate points or landings between the port from which she sets out to the port of ultimate destination; and if a delivery of a single package at

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the first landing reached, with a receipt of the freight therefor, discharges the underwriters upon the principle that *pro rata* freight has been earned, the policy would be a mere fraud. But the true construction of such policies is, that they cover the freight pending at the time of the loss, and the loss is total or partial with reference to such freight only, without regard to freight that has been previously earned. So far as that is concerned, the policy has accomplished its purpose and is at an end. Such freights are no longer at risk and the insurers of course are no longer responsible for them, since they have been earned and paid. But the policy still attaches to the freight not earned. (2 Phillips on Ins. § 1499, 1647; Livingston v. Col. Ins. Co. 3 J. R. 49.)

The principal ground of defence in this case is, that there was *pro rata* freight earned, and consequently the loss was only a partial one, and an instruction was asked upon this point.

The only evidence upon which such an instruction could be based was the testimony of Capt. Eaton, who stated that he received a portion of the damaged goods brought back in the Cataract; had them put up at auction, and from the proceeds handed over to Capt. Willard \$487.35. Captain Eaton was the agent of the underwriters, and he understood that the money paid was for *pro rata* freight, and such also he believed to be the understanding of Capt. Willard.

It is very clear that no *pro rata* freight was earned by the Cataract; for the delivery of the damaged goods at St. Louis, not to the shippers or consignees, but an agent of the board of underwriters, did not entitle the Cataract to any *pro rata* freight. There are cases in which goods may be retained after a disaster has occurred, and the carrier may insist on taking them on after time for repairs has elapsed, and refuse to deliver them up to the shippers or consignees without payment of *pro rata* freight, or in some cases without payment of the entire freight. But no case of this kind was made out or attempted to be proved at the trial. It was not pretended

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that the Cataract was in a condition to insist on a retention of her freight, or that she could be repaired in time to finish her trip. On the contrary, the voyage was abandoned and broken up, and the Cataract did not leave the docks for several months after the accident. She brought back a portion of the damaged goods to St. Louis, where they were sold at auction, and from the proceeds of which the agent of the underwriters paid a portion to the plaintiff.

But can the underwriters, by such a payment, convert a total into a partial loss? The question is, what was the condition and responsibilities of the parties after the voyage was abandoned? Undoubtedly the plaintiff had a right to receive a part payment of his claim in satisfaction of his entire demand, and if his conduct could be so construed that would be another ground of defence. But no such defence was pretended. It is evident that Capt. Willard had no thought of relinquishing any portion of his claim against the underwriters by receiving the four hundred and eighty-seven dollars, whether he regarded it as *pro rata* freight or salvage. That no *pro rata* freight was due, is plain, and that the underwriters can not, by simply calling a payment made by them *pro rata* freight, make it such, is equally clear. The money was either for salvage or was a mere gratuity, and can the underwriters by a mere gratuitous payment to the assured, set up such payment as a bar to a larger sum, which without it would be clearly due? Here is a claim, we will assume, against the underwriters for a total loss, and *their agent* hands over to the assured a sum of money, which he calls *pro rata freight*, and this, it is urged, converts the total loss into a partial one. If this be so, it is always in the power of the insurer to give a character to the loss adapted to his own interest. Suppose this sum had not been paid, would the assured have any claim upon the underwriters for it as *pro rata freight*? Whether the money is paid or not paid, the claim is of the same character, and the case is not at all altered by the fact of payment or refusal to pay. The

question is, was any *pro rata* freight due or earned? and if that is answered in the negative, it matters not what payments have been made by the underwriters in determining the character of the loss.

Our conclusion is, that the instructions asked by the defendant on this point were abstractly correct, but had no application to the testimony, and their refusal could therefore produce no prejudice. The instructions, if given with the necessary explanations of the character and effect which the law would impart to the payment made by the defendant's agent, would have led to the same result.

Where nothing has been done towards earning freight by the goods being carried on in the same or another vessel, or by the shippers electing to receive them at an intermediate port in preference to having them delivered at the port of destination, there is nothing to abandon. The loss is total. (2 Phillips, § 1501; 4 Bingh. 388.)

The eighth instruction, in relation to the duty of the plaintiff in sending forward the goods, was properly refused, as there was no evidence to support it. The goods were sent forward in another boat, so many of them as were in a condition to be reshipped, but at a price which left nothing to the assured. There was no evidence that the goods could have been shipped upon better terms.

Under the instructions given, the jury found that the boat was disabled, by one of the perils insured against, from pursuing her voyage within any reasonable time. As the goods were actually sent on, (whether it was the duty of the insured or not to have done so,) and no *pro rata* freight was earned, we do not see that the refusal of the court to give the instructions asked could have changed the result. We shall therefore affirm the judgment. Judge Ewing concurs.

## THE STATE, Respondent, v. GAVNER, Appellant.

1. The twenty-first section of the ninth article of the act concerning crimes and their punishments (R. C. 1855, p. 642) is properly invoked by an accused person only after trial and conviction; the accused should be tried as if he were an adult, and afterwards, upon suggestion, the court should ascertain the age, and if he be found to be under sixteen years of age, the court should adjust the punishment in accordance with the statute.

*Appeal from St. Louis Criminal Court.*

J. W. Sharp, for appellant.

Mauro, (circuit attorney,) for respondent.

SCOTT, Judge, delivered the opinion of the court.

The defendant was indicted for grand larceny and convicted. The question in this case arises under the twenty-first section of the ninth article of the act concerning crimes and their punishments, which provides that whenever any person under the age of sixteen years shall be convicted of any felony, he shall be sentenced to imprisonment in a county jail not exceeding one year, instead of imprisonment in the penitentiary as prescribed by the preceding provisions of this act.

On the trial a witness testified that he had been sitting in the court-room and a few moments before had been asked by the attorney for the defendant what he thought was the probable age of the prisoner, and, without any knowledge of the object in putting to him the question, he had answered him that he thought the prisoner was between fifteen and sixteen years of age; that he had no acquaintance with the prisoner and had never seen him before; that this was his opinion based upon a view of the prisoner, with whom he had no acquaintance nor any means of knowing his age. This was all the evidence in the cause. The court thereupon instructed the jury that the only question for them to decide was the age of the prisoner and the assessment of the punishment, the

larceny of the goods, their value and ownership being admitted by the defendant; that if they believed the defendant was under sixteen years of age, they would so state in their verdict and assess his punishment by imprisonment in the county jail not exceeding one year; and if they found him over sixteen years, they would assess his punishment by imprisonment in the penitentiary for a term not less than two nor more than five years. And the court further instructed the jury that they could view the prisoner in ascertaining his age, and from the evidence of the witness and their view of him as he sat in court, they would form their opinion and judgment as to his age. This instruction was excepted to.

The proper construction of this act, as I conceive, requires that the prisoner should be tried as though he was an adult, and if he is convicted his punishment will be assessed accordingly, and afterwards, upon suggestion, the court will ascertain his age, and if he is found to be less than sixteen years, will adapt his punishment to his age in pursuance to the statute. This seems necessary for the protection of persons of the age mentioned in the statute. If one under the age of sixteen should be tried for a felony, and the fact that he was under sixteen years of age should be overlooked during the trial, if he is regarded in the light of an adult, would not he lose the benefit of the statute or be much embarrassed in afterwards obtaining its protection; or may not offenders fail to make the defence and after a conviction seek a new trial on this ground?

This provision is for the protection of persons of tender years. Inspection may be necessary in order to ascertain the age. How will the verdicts of jurors be controled if the jury determines from inspection? The execution of this law may be more safely confided to the judges than to juries. No court would suffer a person entitled to the protection of this section to undergo the punishment of an imprisonment in the penitentiary.

This seems the proper construction of the statute. Its language is that no person convicted of a felony under the age

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of sixteen years shall be sentenced by the court to imprisonment in the county jail, &c. This presupposes that the conviction and the assessment of the punishment in the penitentiary are before the court. The court *sentences* and not the jury, and if the court, by inspection of the prisoner or any other sufficient evidence, is satisfied of his exemption from the punishment assessed, it will adapt the punishment to his age.

The matter of the prisoner's age was not brought by any suggestion to the attention of the court; indeed, from what had taken place, it may well be supposed that it was deemed wholly unnecessary, as there was no evidence, or at least any that was entitled to any weight, that the prisoner was under sixteen years of age.

I am in favor of affirming the judgment. Judge Ewing is in favor of affirming the judgment. Judge Napton absent.



WALLINGFORD *et al.*, Respondents, v. HOME MUTUAL FIRE  
AND MARINE INSURANCE COMPANY, Appellant.

1. In order that a policy of insurance may be binding upon the insurer, it must be accepted by the insured.
2. The charter of a mutual fire insurance company declared that the applicant for insurance "shall, before he receives his policy, deposit his promissory note, &c., a part not exceeding ten per cent. of which shall be immediately paid." The by-laws provide that "policies shall take effect at 12 o'clock, noon, on the day of approval at the office of the company, and shall be binding thereafter, provided the premium or ten per cent. tax on the premium note has been paid," and that "ten per cent. of the premium note shall be paid in all cases and endorsed on the policy." *Held*, that the giving of the note and payment of the prescribed ten per cent. were conditions precedent to the taking effect of a policy.

*Appeal from St. Louis Court of Common Pleas.*

The facts in this case sufficiently appear in the opinion of the court. At the instance of the plaintiffs the court gave the jury the following instruction: "1. If the jury find from

the evidence that the plaintiffs applied to the defendant for insurance on the property and for the sum set forth in the petition, and at the time executed their promissory note in blank to be filled up and retained by defendant for such sum of money as the said defendant should fix as the premium upon the insurance applied for; that the said defendant accepted said application, filled up said note for the premium and retained the same; that said defendant executed its policy in favor of plaintiffs for the sum and on the property described in the petition, and that said policy was sent to defendant's agent at Weston for delivery to plaintiffs; that said policy was received by said agent for a reasonable length of time before the fire, and that plaintiffs, before the fire and after the receipt of said policy by said agent, applied to him for said policy and was willing and ready to pay such portion of said premium or per centage on the premium note as defendant might properly require; that the property mentioned in the petition was destroyed by fire as in said petition alleged, then they will find for plaintiffs in the sum claimed, less ten per cent. on the amount of the premium note."

The court gave the following instructions at the instance of defendant: "2. The plaintiffs are not entitled to recover unless the jury believe from the evidence that plaintiffs accepted and consented to the rate and terms of insurance proposed by defendant before the fire. The acts and declarations of the plaintiffs and of the witness Bird after the fire are not competent evidence in this case and should be disregarded by the jury."

The court, at the request of the jury for further instructions, gave the following: "3. If the application of the plaintiffs for insurance was sent to the defendant by its agent, and at the same time a blank premium note signed by the plaintiffs was sent to be filled up for such sum, or at such rate of insurance, as the defendant should fix; and if the application of the plaintiffs was accepted by the defendant, and the premium note was filled up by the defendant and the policy issued, then the plaintiffs were insured from the time the

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note was filled up and the policy issued, although it was not yet delivered to the plaintiffs. 4. By the instructions given at the instance of the defendant it is not intended by the court that the plaintiffs should have accepted the terms of the insurance subsequent to issuing of the policy."

The court refused the instructions asked by the defendant.

*Glover and B. A. Hill*, for appellant.

I. The company is a mere creature of the charter and can only act in the mode pointed out. The charter and by-laws made the payment of ten per cent. of the premium note indispensable to the consummation of the contract. The company can not waive such condition. The conditions of the policy must be complied with. The authority of the agent, Bird, were limited to receiving and forwarding applications, delivering policies and receiving the per centage. There is no evidence that any officer of the company in St. Louis had notice through Bird or otherwise that plaintiffs agreed or proposed to take the policy at any rate the company might fix and be bound by such rate, and no notice to or agreement with Bird to that effect could bind the company. There never was any mutual agreement or assent or union of minds upon any rate or terms of insurance. There was error in giving the instruction as asked by plaintiffs, and in giving those given upon the court's own motion.

*Biddlecome*, for respondents.

I. It is not essential to the contract of insurance that a policy shall have been executed and delivered. (29 Maine, 51; 17 Ohio, 192; 9 How. 390.) The company may bind itself by a contract of insurance in the absence of a deposit of a premium note and payment. (20 Ohio, 529; 4 Cow. 645; 2 Curtis, 524; 1 Wash. C. C. 93.) Bird was not authorized by respondents to fill up their application with the rate of nine per cent. or any per cent. The demand for the policy, of which there was abundant testimony for the finding of the jury, the agreement of respondents with Bird to pay the rate fixed by the company, and the readiness of re-

spondents to pay the sum demanded even before delivery of policy, are each and all most conclusive proof of an acceptance of the contract of insurance.

EWING, Judge, delivered the opinion of the court.

This was an action on a policy of insurance. The respondents were doing business in the city of Weston, Mo., in the firm name of Wallingford & Newman. The appellant was a Mutual Insurance Company, holding a charter from this state, and located and doing business in St. Louis.

By the eighth section of the charter it is declared that every person becoming a member of the company by effecting insurance therein shall, before he receives his policy, deposit his promissory note for such sum as shall be determined by the directors; a part, not exceeding ten per cent., of said note shall be immediately paid for the purpose of discharging incidental expenses, &c.; another provision of the charter provides that insurance shall be made on the written application of the assured. The by-laws make it the duty of the president, alone or jointly with any director, to examine all applications for insurance, fix the sum or sums to be taken on each, and the rates of insurance, and approve the same by endorsement on the back of the application; also that "policies of insurance shall take effect at 12 o'clock, noon, on the day of approval at the office of the company, and shall be binding thereafter, *provided the premium or ten per centage on the premium note has been paid.*" Sec. 8, article 4 of the by-laws further declares that ten per cent. of the premium note shall be paid in all cases and endorsed thereon; one dollar shall be paid to the secretary for each policy, and fifty cents for every assignment or transfer, and one dollar shall be allowed agents for each application taken by them, provided the same is affirmed; and the charter, amendment, by-laws, and conditions of insurance, annexed to the policy, and the application for insurance, are all by express terms made a part of the policy—all which, together with the policy and premium note, were read in evidence on the trial. Be-

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sides these, the evidence in the case consisted of the deposition of L. D. Bird, and Salisbury, the secretary of the company. Bird was the local agent of the company at Weston for receiving and forwarding applications for insurance; and to him the respondents made their application for insurance to the amount of twenty-two hundred dollars for six years on the property described in the petition. The application was filled up by Bird at the rate of nine per cent. premium for the six years, and a blank premium note was signed at the same time by respondents and delivered to Bird, who forwarded them to the company at St. Louis. It also appeared from the deposition of Bird that some time after they were sent down, and before the appellant would issue the policy, a resurvey of the property was required, which was made and forwarded; that the application was then acted upon by the president, who approved the risk at the rate of *fifteen per cent.* premium for six years; and on January 20, 1855, a policy was made out, signed and sent to the agent, Bird, with a letter explaining the reasons for fixing the rate so high, and directing that if the insured should think the rate too high, the agent might return the policy without charge; that the agreement between respondents and himself (Bird) at the time application was made, was that the former should take the policy at any rate fixed by the company, and that the rate nine per cent. was set down by him merely to influence the company to fix it at what he thought was a reasonable and fair rate. The policy reached Weston while the agent (Bird) was absent in Nebraska, and on or about March 8, 1855, the property was destroyed by fire. Bird was absent a greater part of the time between the date of the policy and the fire. During this time inquiry was made of him by respondents whether the policy had arrived, but no demand was made for it, and no offer to pay the premium; nor does it appear that the respondents knew before the fire occurred at what rate the premium had been fixed, or that a policy had in fact been made out by the company. It would seem from the testimony of Bird that the policy, having been re-

ceived in his absence, had been mislaid in his office and lost sight of, and that when inquiry was made of him concerning it by the respondents, he was in doubt whether it had been received at all, or whether he had not delivered it to them, but did not suppose it was actually in his possession until he found it after the fire. It appears from the testimony of both Bird and Salisbury that the former had no authority to fix the rates of insurance, or to accept risks, but only to receive and forward applications. It does not appear that the respondents, at the time of the application, offered to pay any portion of the premium, though Bird says he is not certain that they *did not*, but that he had no power to bind the company by receiving it, and did not do so.

Salisbury, the secretary of the company, exhibits and reads a copy of a letter written by him to Bird, dated January 20, 1855, enclosing policy and giving statement of sum due on it at fifteen per cent., and directing that if the respondents should think the rate too high, he could return the policy without charge. The application was received by the company from their agent (Bird) January 3, 1855. He also states that no premium was ever paid to the office; that the only authority that Bird had for delivering said policy to respondents was the letter alluded to. These are the material facts in the case.

The question we propose to consider in reference to the instructions given and refused is whether, under the state of facts proved, there was any acceptance of the terms of insurance on the part of the respondents; in other words, whether there was a mutual assent of the parties or union of minds to the terms, so as to complete a contract of insurance. Was the acceptance of the policy, the giving of the premium note, and the payment of ten per cent., any or all these, prerequisite to its consummation? It is not pretended that the agent had any authority to make a contract of insurance, to agree upon the rate of premium, or to take risks. No question can arise as to the extent of his power as the company's agent; it was confined to that of receiving applications and

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forwarding them to his principal. The application was filled up for insurance at the rate of nine per cent., and may be considered as an application for insurance at that rate, or an offer on the part of respondents to give that much. It is true this sum was inserted in the application by the agent, Bird; but nothing appears to show that appellant knew any thing of the reasons that induced Bird to specify this rate, or that it was not in fact the proposition of the respondents to have insurance effected at that rate. Further information having been obtained respecting the condition and situation of the property, the rate of insurance was fixed at fifteen per cent., and the policy was sent to the agent with instructions that it could not be taken for less; that if the respondents deemed it too high, that he (Bird) could return it without charge.

There was here no assent or union of minds to the terms proposed, but one proposition made which was not accepted, and another and different one submitted by the company, which was not accepted nor even known to have been made before the fire. The case would not have been different if no rate had been specified in the application, (and it was the same thing in effect, for Bird had no authority to agree upon it,) and it had been forwarded to the company. It could scarcely be maintained in such case that the company would have been bound before the terms had been submitted to and accepted by the respondents. Here is an application for insurance, and terms are proposed by the company, which the respondents were at liberty to accept or reject at their option. But it was never acted upon before the loss, and could not have been, because they were not informed of it. It does not appear that the company knew, before the fire occurred, that the respondents proposed to hold themselves bound by any rate of insurance that it might fix; and even if Bird had knowledge of this, the company would not be bound by it.

Although the policy may have reached Bird and been in his possession before the loss happened, it was the same thing as if it had remained in the possession of the company, for

it never passed from the agent, and never had been seen or assented to by the respondents, and there was no delivery of it to them. It was a mere proposition which had not been submitted to, much less assented to, by the respondents, and no act of theirs could convert it into a contract of insurance after the fire occurred, or give it effect as such.

But there is another reason why this policy never took effect, which is that the ten per cent. on the premium note had not been paid. We have seen that the charter declares that the applicant for insurance "shall, before he receives his policy, deposit his promissory note, &c., a part, not exceeding ten per cent. of which, shall be immediately paid." The by-laws provide that "policies shall take effect at 12 o'clock, noon, on the day of approval at the office of the company, and shall be binding thereafter, *provided* the premium or the ten per cent. tax on the premium note has been paid," and "that ten per cent. of the premium note shall be paid in all cases and endorsed on the policy." The evident meaning of this clause of the charter is that the giving of the note and paying the prescribed per cent. are conditions precedent to the taking effect of the policy, and it is so interpreted and carried out in the by-laws which have been quoted; and any by-law which had not exacted these terms would have been inconsistent with and unauthorized by the charter. The policy, it is true, was approved on 20th of January, and would have been binding from noon of that day if the contract of insurance had been perfected and the money paid; but having been approved without the assent of the respondents to its terms and the payment of the required sum, the policy was incomplete as a contract of insurance, and remained so by reason of the non-assent of the respondents.

Mr. Phillips, in his work on Insurance, says the execution of a contract of insurance is not distinguishable from that of other written instruments; that though a policy is a contract between two parties, each of whom is under certain obligations and entitled to demand of the other a compliance with certain implied and expressed conditions and stipula-

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tions, it is subscribed only by the insurer himself or by his agent or attorney, and when so subscribed and actually or constructively delivered *unconditionally* to the assured it is a complete and binding contract; and the general rule and usage applicable to contracts of insurance, (irrespective of any special regulations by charter or by-laws,) according to the same author, is that in the usual form of the policy the insurer on a marine risk acknowledges payment of the premium and on fire or life policies of the whole or first annual premium or deposit, or first instalment, and accordingly always imports a settlement, by cash or premium note, of a part or the whole of the premium, simultaneously with the execution and delivery of the policy. This is equivalent to saying that the contract is not in force until such payment has been made. As the company derives its existence and powers from the charter, of course the charter is the law of its being and rule of conduct in the administration of its affairs; and to this, and the by-laws enacted pursuant to it, the company must be restricted in the transaction of its business.

In contracting with such a body it is necessary not only to see that the contract is one within its authority to make and that the person acting as the agent of the company is authorized to bind it, but also that the contract is in the form by which the company, according to its constitution, may be bound. (1 Phillips, § 11.)

A number of cases have been cited by the respondents' counsel, all of which, we think, are distinguishable from the case before us. In *Blanchard et al. v. Waite*, 28 Maine, 51, the suit was assumpsit on a contract of insurance against a member of a voluntary association of underwriters, for whom the secretary was authorized by a general power of attorney to use the names of all the associates in signing policies of insurance. One of the plaintiffs applied to the president for an insurance on a vessel, of which they (plaintiffs) were sole owners, who, after consultation with the director for the week, agreed to take the risk, and the plaintiff applying

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signed the terms on the proposition book. Nothing was said about a premium note, which, under the articles of the association, the secretary was at liberty to take on such time as the directors might determine. When the proposition book was signed the applicant was informed the insurance was complete. It was shown that, according to the prevailing custom there, the insurance offices kept proposition books where the applicants sign the same, and then leave the office considering themselves insured, the contract being regarded as finished at the time of signing the book. It was under this state of facts that it was held that neither the giving the premium note nor the reception of the policy by the insured were prerequisites to the consummation of the contract of insurance, but that it was completed when there was an assent to the terms of it by the parties upon a valuable consideration.

In *Taylor v. Merchants' Insurance Company*, 9 How. 391, one question was whether, (where there was a correspondence relating to insurance of a house against fire,) the company having made known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms. In the instructions of the company to their agent at a distant place, he was advised to transmit all applications for insurance to the office for consideration, and that upon receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate acceptance to the company; and the policy to be thereafter issued is to bear date from time of the acceptance. The court held that in accordance with the usage of the companies, as well as upon general principles of law governing contracts entered into by absent parties, the contract was complete when the assured placed a letter in the post-office accepting the terms. The claim was also resisted by reason of the nonpayment of the premium note, the actual payment of which, according to the condition annexed to the policy, was necessary to make the insurance binding. The agent was instructed to give no

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credit for premiums, but no mode of payment had been prescribed by the company, and the agent was at liberty to use a discretion in the matter, and he accordingly directed the insured to pay it in a check payable to his order. The agent, on communicating to the insured the terms received from the company, said to him that if he desired to effect the insurance he could send to the agent his check "and the business would be concluded." The transmission of the check by mail was held a payment of the premium within the terms of the policy, and that in judgment of law it was actually paid at the time the contract became complete.

In the case in 20 Ohio, 527, cited by counsel, the contract of insurance was made with an agent who, it appears, was fully authorized to make a valid contract without the ratification of the company. The case in 4 Cowen, 145, involved the question of the authority or powers of the agent to bind the company in the given case, and is unlike the case at bar in its leading facts. The remaining cases cited, we think, are also inapplicable.

In the view we have taken of the case, we are of opinion that the instructions given at the instance of the respondents, and by the court on its own motion, were erroneous, and that those asked by the appellant should have been given.

We see no error in excluding or admitting evidence. Judgment reversed; the other judges concurring.

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GATY *et al.*, Plaintiffs in Error, v. PHOENIX INSURANCE COMPANY, Defendant in Error.

1. A time policy of insurance on a steamboat, which authorized the boat to navigate the usual waters of the Mississippi, Ohio, Illinois, Tennessee and Cumberland rivers, contained this proviso: "Provided, that the steamboat shall not be employed in the cotton trade, unless the consent of this company be obtained and endorsed thereon." *Held*, that the underwriters would not be responsible for a loss of the boat occurring while she was engaged in the cotton trade.

*Error to St. Louis Court of Common Pleas.*

Plaintiffs effected an insurance with the defendant to the amount of \$5,000 upon their interest in the steamboat Mayflower against fire and perils of the river for one year from January 20, 1855. In the policy it was provided that it should be lawful for said steamboat, during the continuance of the policy, to navigate the usual waters of the Mississippi, Ohio, Illinois, Tennessee, and Cumberland rivers. It was further provided as follows: "And to proceed to and touch and stay at any places on said waters, if thereunto obliged by stress of weather or unavoidable accidents, or if the same be necessary for the transaction of any lawful business connected with the voyage, without prejudice to the insurance. Provided, that the said steamboat shall not be employed in the cotton trade unless the consent of the company be obtained and endorsed thereon."

The cause was tried by the court without jury. The court made a finding of the facts, which, after setting forth the policy, proceeded as follows: "In the latter part of September, 1855, alterations were made on the Mayflower to make her more convenient for stowing cotton. On the 21st of September, 1855, the officers of the boat caused to be published in the newspaper at Memphis, Tenn., the following advertisements: '1855. Mayflower—Joseph Brown, master—Memphis and New Orleans regular Tuesday packet. This new and splendid steamer, built the past season at a cost of more than \$100,000, has been placed permanently in the Memphis and New Orleans trade, and will remain the entire season, leaving Memphis on Tuesday, the 20th September, at four o'clock P. M., and every alternate Tuesday thereafter. Shippers may rely on the Mayflower running permanently in and becoming identified with the trade, as hereafter she will be principally owned in Memphis. The passenger accommodations are superior to any on the western waters, having larger rooms, with linen outfits, tables set restaurant style, &c. For freight or passage, apply on board, or to Duval,

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Algeo & Co.' = '1855—1856. Memphis and New Orleans—regular Tuesday packet *Mayflower*—Jos. Brown, captain—Henry Filbrun, clerk. The middle deck of this magnificent steamer having been taken out for the purpose of making her suitable for the Memphis and New Orleans trade, she will commence her regular trips about September 25th, and continue during the season. Shippers may rely on her remaining permanently in the trade. Duval, Algeo & Co., Lavalette & Morris, agents. (Enquirer and Appeal copy.) About the last of September, 1855, the *Mayflower* commenced running as a regular packet between Memphis, Tennessee, and New Orleans. Her regular day for leaving Memphis was every alternate Tuesday. From the time she commenced running in said trade she made five or six trips, and on each down trip she was loaded chiefly with cotton; and the last trip she made from Memphis to New Orleans she had on board about 3,700 bales of cotton. The principal article of export from Memphis, and from points below Memphis to Bayou Sara, is cotton. Cotton is the staple of the country between the points aforesaid, and constitutes the great bulk of all freights and cargoes carried by steamboats from Memphis to New Orleans, and a very large proportion of the cotton from Memphis down is carried by the boats running between Memphis and New Orleans, although transient boats from the Ohio river and from points above the mouth of the Ohio river sometimes carry cotton. Cotton trade, as applied to navigation, is the trade in which boats are engaged when cotton is the principal article shipped, and the trade from Memphis, and points as low down as the sugar region, to New Orleans is the cotton trade. On the 1st of December, 1856, the *Mayflower*, about 11 o'clock in the forenoon, arrived at Memphis from New Orleans, and on that day made a contract to carry to New Orleans from Bradley's landing, about sixteen or eighteen miles above Memphis, from 12,000 to 15,000 sacks of corn, to be carried in parcels of from 3,000 to 6,000 sacks a trip. Accordingly, on the day of her arrival at Memphis she went up to Bradley's landing, took on board

about 4,800 sacks of corn, which were all that were ready for shipment, and returned to Memphis about 11 o'clock the night of December 1, 1855, which was Saturday, and on the next night, whilst lying at the port of Memphis waiting for Tuesday, her regular day for leaving, with no freight on board except said corn, she was burned and lost. The fire was communicated by the steamboat George Collier, which was also a boat engaged in the cotton trade. The last named boat had just arrived from New Orleans, but neither of the boats had any cotton on board at the time of the fire. The master of the Mayflower refused to contract for carrying cotton as the boat passed up the river to Bradley's landing, but the corn taken at Bradley's landing was not one-fourth of a cargo for the Mayflower, and her officers expected to complete her cargo with cotton, and would have carried, if the boat had not been lost, 3,000 bales of cotton. From the latter part of September to the 1st of December, 1855, the Mayflower was engaged in the cotton trade, and at the time she was burned she only had on board a part of her cargo and intended to complete her cargo with cotton. On the above facts the court decides the plaintiffs are not entitled to recover and that judgment should be for defendant."

*Shepley and N. D. Strong*, for appellants.

I. The proviso does not in any manner limit the waters within which the Mayflower was insured by the policy. The boat had the most perfect right to navigate the whole Mississippi river from New Orleans to St. Louis, and any or every part of it. There is no restraint or prohibition. This has no resemblance to the case of a prohibition in a policy from going to a certain place. The boat might have run from Memphis to New Orleans at any time during the year. It is admitted that if the boat had been running from St. Louis to New Orleans, passing over the same waters as she did during the trips from Memphis to New Orleans, that she would be clearly within the policy. The proviso means that the boat shall not have the right to carry cotton, as that is an

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article which the insurers deemed hazardous. The carrying of cotton, no matter how many times done, so long as no cotton was on board at the time of the loss, does not vitiate the policy. The carrying of cotton for one trip would not vitiate the policy. If the rule be as contended for, then a majority of the fire policies through this state are void. Most of them require matches to be kept in metallic vessels. There is scarcely an instance where at some period matches have not been kept in other places than a metallic vessel. Are all these policies from that moment to be absolutely void? Most of the policies provide that certain liquids shall only be boiled upon the premises in a particular manner pointed out. If the insured should once boil such liquids in a different way, and a fire should occur months afterwards through means of catching from a contiguous building, would that release the insurers? So also with provisions concerning stove-pipes. Where there is a proviso qualifying the risk, it only suspends the risk during the time of the intervention of the prohibited act. Even if there be evidence warranting the finding of the court that it was the intention of the *Mayflower* to carry cotton, it is an immaterial finding, for the intention can have nothing to do with the question whether the policy was violated. An intention to deviate does not vitiate a policy. (1 Arnould on Ins. 349.) Though the insurance was for a specific time, yet every voyage stands upon its own merits, and the insurance for the particular voyage can be avoided only by facts happening upon that voyage if the policy ever attached.

*Glover & Richardson*, for respondent.

I. The evidence supports the finding. The stipulation not to engage in the cotton trade was a warranty, and a literal performance of it was necessary. (1 Arn. on Ins. 577, 580; 1 Marsh on Ins. 346.) The warranty is a condition precedent. (1 Marsh. on Ins. 348; 21 Conn. 32; Pet. C. C. 416; 6 Wend. 494; Cowp. 606.) The clause is a promissory warranty. The *Mayflower* did engage in the cotton trade.

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She was engaged in the cotton trade at the time of the loss. If the boat engaged in the cotton trade at any time during the life of the policy, the warranty was broken and the contract at an end. (1 T. R. 187; 7 New York, 530.)

NAPTON, Judge, delivered the opinion of the court.

Upon the facts found by the court, our opinion is that the *Mayflower* was engaged in the cotton trade at the time of the loss, and therefore the underwriters were not responsible.

The proviso in the policy was not an engagement simply against taking cotton on board the boat, but it was a stipulation that the boat would not, without the consent of the underwriters, engage in the cotton trade. If the intention was merely to prohibit cotton as an article of freight, it is apparent that a very unusual mode of expressing that intention was resorted to. Would a boat running from St. Louis to New Orleans, taking on board the articles which usually constitute the freight between these points, forfeit its policy, with a proviso like the present, by bringing up a bale of cotton from New Orleans? Such was not, we think, the design of the prohibition. It was levelled against the cotton trade, not against an actual shipment of cotton on the boat whilst engaged in another trade.

Objections may exist against insuring a boat in a particular trade, altogether distinct from any objections to the character of the freight which that trade might imply.

What constituted the "cotton trade" appears to be very well understood among persons engaged in our river navigation. Boats engaged in that trade are constructed or fitted up with reference to its demands. The *Mayflower* was altered with a view to the requirements of this trade, and was engaged in the trade for several months previous to her destruction by fire.

A permission to navigate the waters of the Mississippi, Ohio, Illinois, Tennessee and Cumberland rivers, contained in the policy, was not at all inconsistent with the prohibition against running in the cotton trade. The boat might have

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been a regular packet from this port (St. Louis) to Nashville, or Memphis, or New Orleans, and not, according to the evidence of all the witnesses, engaged in what is known as the cotton trade. To carry a single bale of cotton from Nashville to St. Louis does not imply that the boat is engaged in the cotton trade.

If the boat had left the cotton trade and embarked in a trade not prohibited, and an injury had been sustained covered by the policy whilst engaged in the trade allowed, the question would have been raised whether the previous breach of the stipulation did not wholly discharge the underwriters from liability. There is no doubt that in policies covering a single voyage a breach of a warranty would discharge the insurers, whether the loss had any connection with that breach or not. That rule is well established, however harsh its application may seem in particular cases. The principle was no doubt fixed with a view to ocean navigation, where disasters usually occur far from the observation of any human eye except of those who are the agents of the insured. Whether the principle ought to be applied to what are called time policies in our river navigation, is not necessary to be determined. The liability in such cases, like that of innkeepers under the common law, would be a strict and perhaps a harsh one; but not more so than the well settled law which exempts the underwriter from all responsibility where a ship is warranted to sail on one day and does not sail until the next. It is difficult to trace a shipwreck occurring perhaps six months after the commencement of the voyage to the fact that she weighed anchor the day after or before her policy required.

It is unnecessary, in the view taken of this case, to discuss the distinction between warranties and representations. The name by which the stipulation in this policy may be called will not change its character. It was clearly a declaration on the part of the underwriters that they would not be responsible for losses occurring whilst the boat was engaged in the cotton trade. The disaster happened when she was run-

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ning in that trade. Whether there was any connection between the loss and the breach of the engagement is immaterial. It occurred when the boat was actually in default, and it is well settled that in such cases it is not incumbent on the insurers, in order to exempt themselves from liability, to be able to trace the loss to the default. It is like a case of deviation, where no inquiries will be allowed as to whether the accident might not have happened had the boat remained in her course.

Judgment affirmed. Judge Ewing concurs.

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BOGGS & LEATHE, Respondents, v. AMERICA INSURANCE COMPANY, Appellant.

1. A concealment of facts by an applicant for insurance of a building against fire is not material unless a disclosure of the facts concealed would have induced the insurer to decline the risk or enhance the premium.
2. In contracts of fire insurance, it is sufficient if the applicant for insurance make true and full answers to the questions put to him by the insurer in respect to the subject of insurance; he is not answerable for an omission to mention the existence of other facts about which no inquiry is made, unless he knows such facts to be material and intentionally fails to communicate them.
3. Statements made to insurers in respect to the subject of insurance can not be invoked against the insurers to overthrow the defence of a fraudulent concealment of material facts unless such statements were made in connection with the application for insurance.

*Appeal from St. Louis Circuit Court.*

This was an action on a policy of insurance against fire. The policy was issued upon a written application of plaintiffs and the personal application of and verbal statements of plaintiffs or one of them. The defence relied on is that there was a concealment of facts material to the risk. The concealment charged consisted in this, that the plaintiffs failed to state that portions of the building, a store, in which the insured goods were, were occupied as a dwelling-house by one of the plaintiffs and another.

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At the instance of the plaintiffs the court gave the following instructions: "1. If the jury find that there was a concealment of any material fact on the part of plaintiffs while engaged in effecting the insurance in question, then the policy is void and plaintiffs can not recover; and a material fact is one which if known would have induced the insurance company to decline the risk entirely or to have charged a higher premium. 2. If you find that the families of Spore and Boggs resided in a part of the building containing the goods insured, and that fact was not known to the secretary of the defendant when the policy was issued, and which, if known, would have induced the defendant to have declined the risk or to have charged a higher rate of premium thereon, and that the plaintiffs, when making their application, concealed the facts from the proper officers of the defendant, then plaintiffs can not recover in this suit. 3. If the jury find that an interview was had between either of the plaintiffs and the secretary of the America Insurance Company touching the insurance in question at any time before the policy was issued, and in that interview said secretary was informed that some of the upper stories of the building containing the stock of goods insured were occupied as family residences for the families of Spore and Boggs, and that there was no material change in regard to such residences from the time of such interview to the issuing of the policy, then there was no such concealment as to the matter of such residences as will avoid the policy sued upon. 4. If you find that there were no specific inquiries of plaintiffs or either of them concerning the occupation of the upper stories of said building, then there was no such concealment as avoids the policy, unless you believe that plaintiffs knew that the families residing in said buildings were material facts and intentionally failed to communicate the same at the time of effecting the insurance. 5. Though the jury should believe from the evidence that the fire, which caused the loss sued for, resulted from negligence or carelessness of a servant of plaintiffs, that is no defence to this action."

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The following instruction asked by defendant was given: "6. If the plaintiffs, or one of them, at the time the application for insurance to the defendant was made, was interrogated or inquired of by the secretary of the defendant as to the manner the building was occupied or used in which the property insured was situated; if in answer to such inquiries the plaintiffs neglected or failed to state that the said building was then occupied and used in part by their own families and the family of the witness Spore, as given in evidence; if the jury find from the evidence that the manner in which said building was occupied was a material fact for the defendant to know in respect to taking the risk under the policy in question; then the plaintiffs can not recover in this action, and the jury should find for the defendant, unless the jury at the same time find from the evidence that the defendant knew said building was occupied when the policy in question was issued."

Other instructions asked by defendant were refused.

*Krum & Harding*, for appellant.

I. There was error in the first and second instructions given on behalf of plaintiffs, in this, that both assert and assume the principle that there could have been no material concealment unless the fact concealed was such that, if known to the defendant, the risk would have been declined or a higher rate of premium charged. It is sufficient if a misrepresentation *tend* to influence the insurer's estimate of the character and degree of the risk; or if there be a concealment of a fact which, if communicated, would tend to prevent the insurer from entering into the contract or to demand a higher premium. (1 Phill. on Ins. § 524, 531.) The instructions directed the minds of the jury, not to the question whether the facts alleged to have been concealed enhanced the risk, but to the inquiry whether defendant might not have entered into the contract with as well as without knowledge of these facts. Under these instructions the jury might very well come to the conclusion that the

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risk upon goods in a house occupied as these premises were would be greater than upon goods in a store-house not used for the residence of families, and that plaintiffs failed to communicate the facts respecting the nature of the occupation of the premises ; while at the same time they might also find that the concealment was not material, because defendant *might* have taken the risk on the same terms even if the enhancement of the risk had been known to them. The use of the words "concealment" and "concealed" in said instructions being unexplained, was calculated to mislead the jury. They would naturally infer that there must have been an intentional or dishonest suppression of facts in order to constitute a concealment. (1 Phill. on Ins. § 537, 546.)

II. The court erred in giving the third instruction. The conversation with Boggs was before any application was made for insurance.

III. The fourth instruction given was not law. The rule is that any circumstance evidently and materially enhancing the risk of fire, known to the applicant at the time of insuring, and not known or presumed to be known to the insurer, and of which he is not bound to inform himself or take the risk of it, must be disclosed, though no inquiry is made respecting it. (1 Phill. on Ins. § 635.) No one would have reason to suppose that families resided in the building. Such use of a building of that description was so unusual that no inquiry was necessary in order to make it plaintiffs' duty to disclose the fact. (1 Phill. on Ins. § 635.) That the risk was materially enhanced by the keeping of numerous fires in the upper stories is too clear for argument. The instruction requires the questions to be specific.

IV. The court erred in refusing the third and fourth instructions asked by defendant.

*Drake*, for respondents.

I. The law governing misrepresentations and concealment in obtaining a policy of fire insurance was correctly laid down by the court. The premises were accessible and open

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to the underwriter's examination. They were only a few blocks from the insurance company's office. The company can not avoid payment of the loss on the ground that the insured did not disclose a material fact unless the insured knew the fact to be material and concealed it. (5 N. Y. 469.) When the underwriter makes specific inquiries about any matter connected with the premises, the applicant must respond fully and truly. If he does not, it is a concealment which avoids the policy whether the matter be material or not. (Angell on Life and Fire Ins. § 177.) If the underwriter knows of the existence of a fact, it is no concealment not to state it. (Carter v. Boehm, 3 Barr. 1910.) The materiality of any fact is a question for the jury, and depends upon whether if known to the underwriter it would have caused him to decline the risk entirely or to charge a higher premium. (Angell on Fire and Life Insurance, § 175, 122; 2 New York, 43.)

EWING, Judge, delivered the opinion of the court.

The questions to be considered arise upon the instructions given and refused. The first and second given for the plaintiff, it is maintained, are erroneous in declaring that there is no material concealment unless the fact concealed was such that if known to the defendant the risk would have been declined or a higher rate of premium would have been charged. The correct rule, it is maintained, makes the distinction between a material and an immaterial fact, as the terms are here employed, to consist in its *tendency* to prevent the insurer from taking the risk or demanding a higher premium; and it is objected that the instructions improperly directed the minds of the jury, not to the question whether the fact alleged to have been concealed enhanced the risk, but whether the defendant might not have entered into the contract.

The question of the materiality or immateriality of the fact is always for the jury; and there would seem to be no other practical or reasonable guide for juries than the rule

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as laid down in the instruction. An insurer, in deciding whether he will take a risk of this kind and the rate of premium he will charge, is presumed to do so upon an examination of all the circumstances connected with the subject of insurance affecting the risk, and whatever does not affect the risk so as not to enhance it can not be supposed to have influenced his determination, or to have entered into his estimate of the rate of premium charged. So the jury under the instruction, in determining whether a higher rate of premium would have been demanded, or the risk declined, must pass upon the materiality of the fact alleged to have been concealed, and the test of this is whether such fact enhanced the risk; if it did not, it could not be said to be material.

Mr. Angell defines a material fact to be one which if communicated to the underwriter would induce him either to decline an insurance altogether, or not to accept it unless at a higher premium. (Angell on Life and Fire Ins. § 175.) Another author gives the same definition. (1 Arnold on Ins. 536.) Mr. Duer says it can not be said that a concealment is material unless the court or jury are satisfied that a disclosure of the facts concealed might reasonably have induced the underwriter to decline the risk or enhance the premium. (2 Duer, Ins. 393.) The question, he says, is not whether the loss that is claimed is attributable in any degree to the risks that were concealed; but whether, had the facts been known, the underwriter would have subscribed the policy or would have limited himself to the premium that he received. (Ib. 382.) To the same effect is Carter vs. Boehm, 3 Barr. 1911.) In Murgatroyd v. Crawford, 3 Dallas, —, the rule is expressed thus: that if in the opinion of the jury a knowledge of the circumstances that were suppressed would have induced the insurer to demand a higher premium, or to refuse altogether to underwrite, it will be sufficient on commercial principles to invalidate the policy.

The fourth instruction given on behalf of the plaintiffs declares that if there were no specific inquiries of the plain-

tiffs or either of them concerning the occupation of the upper stories of the building, there was no such concealment as avoids the policy, unless they believe the plaintiffs knew that the families residing in the building were material facts, and intentionally failed to communicate the same at the time of effecting the insurance.

The general rule undoubtedly is that any circumstance evidently and materially enhancing the risk must be disclosed by the applicant for insurance though no inquiry is made respecting it, but in its application to fire insurance it is to be taken with the qualification that such circumstances were known to the applicant at the time of insuring and not known or presumed to be known to the insurer, and of which he is not bound to inform himself or take the risk of it, and that there is no concealment. A more rigid rule obtains in marine insurances, and this greater strictness results from the necessity of the case and from the inequality of the contracting parties as it respects a knowledge of circumstances affecting the risk in the one case and not in the other, the confidence that the insurer is obliged to repose in the assured, and the consequent obligation on the latter to good faith in disclosing information which is known to himself and of which the underwriter is presumed to be ignorant. This distinction is well supported by authority.

Mr. Angell, in his work on Insurance, page 209, says the strictness and nicety required in questions arising on policies of marine insurance are not to their full extent applicable to policies of fire insurance, the former being entered into by the underwriters almost exclusively on the statements and information given by the assured himself; in the latter the underwriters assume the risk on the knowledge acquired by an actual survey and examination made by themselves, and not on representations coming from the assured.

In *Clark v. Manufacturers' Insurance Co.*, 8 How. 235, the insurance was upon a cotton factory, and one question was as to the use of lamps in the picker room. The court held that if no representations were made or asked it would not

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be the duty of the insured to make known the fact that lamps were used in the picker room although the risk might have been increased thereby, unless the use of them in that way was unusual. Justice Woodbury, in delivering the opinion of the court, observes that, "as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must be supposed to assume them, and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured who is silent when not requested to speak."

In contracts of fire insurance, there being no fraud, if the applicant make a true and full answer to the questions put to him by the insurer in respect to the subject of insurance, it is enough; he is not answerable for an omission to mention the existence of other facts about which no inquiry is made of him, though they may turn out to be material for the insurer in taking the risk; (*Gates v. Madison Co. Mutual Ins. Company*, 5 N. Y. 475;) because, observes the court, he has a right to suppose that the insurer, in making inquiries in respect to the particular facts, deems all others to be immaterial to the risk to be taken, or that he takes upon himself the knowledge or waives information of them. To the same effect is *Bennett v. Saratoga Co. Fire Ins. Company*, 5 Hill, 192. In the *Protection Ins. Co. v. Harmer*, 2 Warden, O., 472, the point was not necessary to the decision of the case, but the doctrine of the cases above cited is approved, and the propriety of the distinction there taken between fire and marine insurance distinctly recognized. After showing the grounds of this distinction, and that the reason of the rule as to concealments, and the policy on which it is founded in its application to marine risks, entirely fails when applied to fire policies, Judge Raney, who delivered the opinion of the court, lays down the rule thus: "That all that is required of the assured (in fire policies) is that he shall not misrepresent or designedly conceal any facts material to the risk, and that he answer in good faith all questions asked him by the insurer, unless the fact not communicated is one of unusual peril to

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the property, and could not with reasonable diligence be discovered by the insurer or anticipated as a foundation for a specific inquiry." We are of opinion the fourth instruction is substantially correct.

The plaintiffs' third instruction is erroneous, and for this the judgment must be reversed. It appears from the testimony of the secretary of the company that the application for insurance was made by Leathe, one of the plaintiffs, at which time inquiries were made respecting the occupancy of the building; that, some months prior to taking out the policy, Boggs, the other plaintiff, spoke to him about insurance, but he did not consider him as making an application for insurance, and the matter was not formally considered by the directors; and that he made no particular inquiry of Boggs as to the manner the building was occupied, but asked him how it was occupied; that the only application for this insurance acted on by the directors was that of Leathe.

From the deposition of one Ford, read by the plaintiff, it appears that he was present with Boggs at the office of defendant, on one occasion when he, Boggs, went there for the purpose of getting insurance on the stock of plaintiffs in the "Ten Buildings;" that Boggs told the secretary that a part of these buildings were occupied by his own family and that of one Spore, and that the secretary took a memorandum at the time and said he would lay it before the board, but did not see Boggs sign any application, and knew nothing of the terms of any agreement. When this interview took place between Boggs and the secretary of the defendant is not stated with any precision by the witness Ford; but it is evident that it was before the policy was issued, and was not at the time at which Leathe applied; how long before does not appear. It seems that the only application for insurance that was considered by the company, and upon which the policy issued, was that made by Leathe, and if so the defendant is not bound by any communications made at the interview between Boggs and the secretary before the insurance was effected, and not connected with an application therefor.

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It is equally clear that the plaintiffs would not be liable for any concealment or representations that Boggs might have made concerning the subject of insurance under such circumstances, and they would have been no defence in an action by them against the company; for in such cases there is no obligation to disclose facts affecting the risk.

Whether the communications made by Boggs to the secretary at the interview referred to in the third instruction were or were not connected with the insurance that was effected, or related to an application therefor, was for the jury to determine; but, under the rather vague and indefinite phraseology of the instruction, they were not so restricted as they should have been.

The second instruction asked by the defendant, (refused by the court,) being unintelligible as the records present it, will not be noticed, and the third was embraced substantially in the one given for the defendant, and was therefore well refused.

Judgment reversed and the cause remanded; Judge Scott concurring. Judge Napton absent.

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JOHNSON, Respondent, v. JOHNSON'S ADMINISTRATOR, *et al.*,  
Appellants.

1. Among the savage tribes of North American Indians marriage is merely a natural contract, and neither law, custom nor religion has affixed any conditions, limitations or forms other than those which nature herself has prescribed.
2. Permanency is not to be regarded as an essential element of marriage by the law of nature; otherwise all such connections as have taken place among the various tribes of the North American Indians—either between persons of pure Indian blood, or between half breeds, or between the white and Indian races—must be regarded as illicit and the offspring illegitimate; for it is well established that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure. The power of divorce in one or both of the parties to a contract of marriage, at his or her pleasure, is not inconsistent with the law of nature.

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3. A mere casual commerce between the sexes does not constitute a marriage by the law of nature; but where there is a cohabitation by consent, for an indefinite period of time, for the procreation and bringing up of children, that, in the state of nature, would be a marriage.
4. It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere.
5. Where the legitimacy of children is called in question, especially after their death, and after a great lapse of time, every reasonable presumption should be indulged in in favor of legitimacy; very slight circumstances are sufficient to authorize a court or jury to find the existence of a marriage.
6. By the statute law of this state "the issue of all marriages deemed null in law, or dissolved by divorce, shall be legitimate;" (R. C. 1845, 1855, tit. Descents and Distributions;) hence, upon an issue of legitimacy, the inquiry is limited to the mere fact of a marriage *de facto*, and in this investigation the jury are bound to make every intendment in favor of the legitimacy of the children not necessarily excluded by the proof.
7. Where a white man, living in the Indian country, introduced an Indian woman into his family, cohabited with her and became the father of children by her, assumed and discharged parental duties toward those children, provided liberally for their education, introduced them into his household upon his subsequent marriage with another woman, secured their recognition in the social circle in which he moved, and their marriage as his daughters, made liberal provision for them in his will, and solemnly recognized them as his children in that instrument—no question being made as to their legitimacy during the life of the father—*held*, that all these circumstances constituted presumptive evidence of a marriage with the Indian woman, when its existence was questioned nearly fifty years after it is alleged to have taken place, when two of the children were dead leaving heirs, and the father also died without leaving any other children. *Held*, further, that the fact, that after cohabiting with the Indian for years, the white man separated from her and sent her back to her tribe, could have no tendency to overthrow the presumption of a marriage arising from the previous cohabitation and other circumstances, if such separation and sending away were consistent with the usages among the Indians, not only in reference to their own marriages, but to intermarriages with the traders who sojourned with them. It is a right conceded to the husband by the terms of the contract, and its exercise can not therefore be regarded as inconsistent with it.

*Appeal from St. Louis Land Court.*

This case has heretofore been before the supreme court and is reported in 23 Mo. 561. This was a suit instituted by Lucy Johnson, widow of Col. John W. Johnson, deceased, to obtain an assignment of dower in the real estate belong-

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ing to said Johnson at the time of his decease. She claims one-half thereof as a dower under the third section of the dower act of 1845. The petition in the cause is set forth at large in the report of the cause in 23 Mo. 561. The petition sets forth in substance the following facts: Plaintiff was married to said Johnson in 1831 in the city of St. Louis, and lived with him as his wife in said city until his death, June 1, 1854. A marriage contract was entered into between the parties previous to their marriage. This contract is set forth in the report above referred to. By it, it was agreed that the separate property of the contracting parties should, during their joint lives, form a fund from the income of which they and their issue, if any, should be supported and maintained; that "for the purpose of producing such income the said Johnson shall have the management of the said separate property of the said Lucy Gooding." It was also agreed that either might, in any manner or form, dispose of one-third of his or her said separate property without the other's interposing any obstacle; also that either might at his or her death, by will, or declaration in the nature of a will, devise or bequeath to any person in absolute property whatever of his or her property might then remain, so that the survivor should be entirely divested of all interest therein; that on the death of either party, the survivor should retain the full right and title in his or her separate property, and the property of the deceased party should be distributed according to the laws then in force. Said Johnson left a will, which was duly proved and admitted to record. After reciting the antenuptial contract above set forth, the will proceeds as follows: "And I, the said John W. Johnson, declare that after my marriage with my wife, the said Lucy Gooding, with her own free consent, I used and invested thirty-five hundred dollars of her money in erecting as a residence for ourselves during our lives, and at her request—stating the house we lived in on Elm street was too lonesome, and in consequence I erected the two-story brick building we now occupy, on my own

land, situated on the north side of Market street, in said city of St. Louis, and No. 155, and cost me four thousand six hundred dollars, as per my account book. I devise and bequeath to said wife Lucy, during her natural life, and no longer, the said buildings, together with so much of my land, &c., provided, however, my wife keep this house insured for its full value; if she does not, and the house is destroyed by fire or otherwise, after my death, the loss must be hers and not mine; also the taxes to be paid thereon by her after my death." "The devises and bequeaths hereby made to my wife Lucy are intended and declared to be in full satisfaction of all and every claim, right of dower or other demands which she may have to my estate, and on the express condition that it shall be received as such. The real estate herein mentioned and devised to my wife Lucy during her natural life, I devise, after the said Lucy's death, to my grandson, John E. Gleim, and his heirs and assigns; and in default," &c. The testator then proceeds to give directions as to the manner of paying the bequest to the widow. The testator devised and bequeathed almost his entire estate to his daughter Eliza O. Perkins and his grandchildren Rosella Murdock and John Edgar Gleim. Nathaniel J. Eaton became administrator with the will annexed. The other devisees, defendants in this suit except plaintiff, accepted the provisions of the will. There never was any issue of said marriage. The petition proceeds to specify various lots and tracts of ground of which said Johnson was seized at his death; also that after plaintiff's marriage with said Johnson he received various sums of money belonging to the plaintiff, amounting in all to \$5,801; that at the time of said marriage Johnson's property was for the most part wholly unimproved; that he employed the money received of the plaintiff to render it valuable and productive; that Johnson "did never keep or perform the said marriage articles on his part, but violated and broke the same in every part and parcel thereof, and did conduct himself in fraud and bad faith toward her in that

behalf;" that Johnson did merely use and employ the said articles of agreement for the purpose of getting into his possession the property of the plaintiff, and did afterwards refuse, fail and neglect to comply with the said articles in every thing mentioned therein for the benefit of the plaintiff; that he invested her estate so as to improve and enhance the value of his own estate and render it productive of an income for his own benefit and in his own name; that he did not apply the income honestly and in good faith to the maintenance of himself and plaintiff during their joint lives, but merely to the support of himself and certain relatives, children and their husbands and others; that plaintiff received nothing but her clothing, which did not exceed fifty dollars per year in value, and her board and lodging, while she was laboring and toiling assiduously for said Johnson; that the residue of the income derived in common from her property and his he invested for his own benefit and in his own name; that he pretended untruly in his will that he had used only \$3,500 of her money, and that she had requested him to employ the same in erecting the house on his property on Market street; that he attempted, in violation of the marriage articles, to force her to elect to take a dower not worth \$3,500, not only in satisfaction thereof but also in satisfaction of all other claim on his estate; that he wrongfully mixed up her property with his own; that she is now sixty years of age. She insists that as said Johnson did by his will devise to her an estate to be in full satisfaction of dower, he and all persons claiming under the will are estopped to deny her right to dower. On the 8th of December, 1854, she duly elected to take dower in said Johnson's estate under the third section of the dower act of 1845. On the 7th of December, 1854, she duly renounced the provisions of the will above referred to. Plaintiff insists that as Johnson did not in good faith comply with said articles of marriage on his part, she is not bound to comply with the same, and that she is released from all obligations or duty to keep or perform said articles, and

she claims to be entitled to dower in his estate notwithstanding the said articles. Plaintiff prays that for her dower one-half of the real estate belonging to said Johnson at his death may be set off to her absolutely, and also for damages.

The defendants are N. J. Eaton, administrator with the will annexed of said Johnson, John Edgar Gleim, grandson, and Rosella Murdock, granddaughter of said Johnson, Eliza O. Perkins, daughter of said Johnson, and Mason Johnson, trustee of said John Edgar, Rosella and Eliza O. The infant defendants answered in the common form, submitting their rights to the protection of the court. The adult defendants answered setting up the antenuptial contract and denying any breach thereof, denying that said Johnson invested any of the money or property of the plaintiff to improve or enhance the value of his own property or estate except as stated in his will. Defendants allege that said Johnson faithfully performed and complied with the terms and stipulations of said antenuptial contract; that by a previous marriage said Johnson had three daughters born in lawful wedlock, and named Eliza O. Perkins, Mary Murdock, and Rosella Gleim; that Mary Murdock died during the lifetime of said Johnson, leaving a daughter, Rosella Murdock; that Rosella Gleim also died during the lifetime of said Johnson, leaving a son, John Edgar Gleim. The defendants professed a readiness and willingness to refund to plaintiff the money Johnson states in his will he received from her and used in the construction of a dwelling-house for the accommodation of plaintiff and himself, to-wit, the sum of \$3,500; also a readiness and willingness to pay interest on said sum from the date of the death of said Johnson to the time of answering, making the sum total of \$3,885. This sum they offer to pay on account of and in performance of the conditions of said ante-nuptial agreement. Defendants also ask, if any other moneys should be found to have belonged to plaintiff before her marriage and to have come into the hands of said Johnson, that an account may be taken of such money or prop-

erty, and that the estate of said Johnson be charged therewith, and that upon payment thereof plaintiff might be forever barred of dower. This portion of the answer tendering money in compensation of the money and property appropriated by Johnson was stricken out on motion of plaintiff.

The court, on the calling of the case for trial, directed the following issue to be tried by a jury: "Whether John W. Johnson died without descendants in being capable of inheriting his estate." The substance of the testimony bearing on this issue is sufficiently set forth in the opinion of the court. The court, at the instance of the plaintiff, gave the jury the following instruction: "Unless the jury find that John W. Johnson, and the Indian woman with whom he cohabited, mutually agreed to live their whole lives together in a state of union as husband and wife, it was not a marriage, nor are the children born of such union capable of inheriting from the father."

The court refused the following instructions asked by the defendants: "1. If the jury find that the late John W. Johnson took an Indian wife in the Indian country, according to the usages prevailing in that country, and cohabited with said woman, and had by her three children, as stated in the answer, who, or their descendants, are still living, then the jury ought to find the issue for the defendants. 2. If the jury find that the late J. W. Johnson cohabited with an Indian woman in the Indian country, and had by her three children; that he raised and educated them as his own; claimed and procured an allowance for them from the government as half breeds, and always held them out to the world as his children, such conduct of said Johnson is evidence of a marriage in fact between him and said Indian woman. 3. If the jury find that said J. W. Johnson was married to an Indian woman in the Indian country, according to Indian usage, and by her had issue still living, such issue are legitimate, although such marriage was, by the laws of this state, merely void. 4. If said Johnson and an

Indian woman, between the years 1812 and 1822, in the Indian country at and about Prairie du Chien, cohabited together for several years according to the usages prevailing at the place of such cohabitation, and did procreate children, such children are legitimate, and if any of them still survive, the jury ought to find the issue for defendants. 5. If said Johnson and an Indian woman cohabited together and had children, as stated in the foregoing instruction, such children are legitimate, although the parents, at the time of the cohabitation, agreed that their connexion should be dissolved at the pleasure of either party."

The jury found a verdict for plaintiff. At the final hearing of the cause much testimony was introduced bearing upon the question of the execution of the antenuptial contract by said Johnson, and its fulfilment by him, and the appropriation of plaintiff's moneys to his own use and benefit. The court found the facts substantially as set forth in the petition, and decided that plaintiff was not barred of her dower, and ordered and adjudged that she have and recover as dower one-half of the real estate mentioned in the petition, and appointed commissioners to allot, set apart and admeasure to her the said dower, and ordered further that plaintiff do have and recover of defendants her damages for being deforced of her dower. The court assessed the damages at \$7,420.11, computing and estimating the same from the time of the death of said John W. Johnson to the time of trial. The defendants moved the court to set aside this assessment on the ground that it was excessive, and that the court erred in refusing certain instructions asked by defendants, and in assessing or computing plaintiff's damages from the date of the death of the testator to the time of trial. The court overruled the motion.

*Field, Jones & Sherman*, and *Krum & Harding*, for appellants.

I. The court erred in striking out the part of the answer in which defendants offered to pay whatever might be found

to be due to the plaintiff for moneys belonging to her and received by the testator. The court proceeded on the ground that this part of the pleading was bad, inasmuch as the formal requisites of a tender at law were not complied with. The plaintiff's case was purely equitable. The pleadings are to be judged by the rules of equity, and the answer of defendants in the particular part stricken out was conformable to the established precedents.

II. The law of marriage and legitimacy laid down by the court below in its instruction to the jury, is not the law of the land. The validity of a marriage must be tried by the laws or customs of the place where it is had. If it be valid there it is valid everywhere. (Story, Conf. Ll., § 113; Sutton v. Warren, 10 Met. 451, and cases cited.) The marriage of Col. Johnson and Tapissee was unquestionably good according to the laws and customs of the Indians. For the general customs as to marriage among the Indians, the court is referred to Robertson's America, book 4; 2d An. Hist. Col. of Wisconsin, p. 226, 176, 120 and 104; for Choctaw usages, see Wall v. Williams, 11 Ala. 826; for Cherokee usages, Morgan v. McGhee, 5 Humph. 13.) In the two cases just cited, the courts held that a marriage after the Indian custom and dissoluble at the pleasure of either party, was valid by the laws of Alabama and Tennessee. (See 8 Ala. 48.) But the instruction of the judge below does not correctly declare the local law of the state. For, if the parties to a contract of marriage were to insert a term or stipulation that the marriage should be dissolved at pleasure, such term or stipulation would be void, yet the marriage itself would be good. (Rutherforth's Instit. p. 173.) Furthermore, it has been the standing law of this state for more than thirty years that the issue of all marriages deemed null in law shall be legitimate. (See R. C. 1825, 1835, 1845, 1855, tit. Descents.) The instructions moved by the defendants on the trial of the issue, truly declared the rule of presumption arising out of the cohabitation of the parties and the actions

of Johnson in respect to the children. (2 Greenl. Ev. § 462.) Continued cohabitation and procreation of children is sufficient evidence of marriage. (Felts v. Foster, 1 Taylor, 72; Cheseldine v. Brewer, 1 Harris & McH. 152; 1 Dev. 337; 1 Penn. 450; 4 B. Monr. 575; 2 Nott & McC. 114; 9 Paige, 343; 1 Bland, 479; 2 Hay, 102; 4 Ala. 142; 1 Pick. 505; 3 Mo. 441.) And after a lapse of thirty years and when the parties are dead, legitimacy will be presumed on very slight proof. (Johnson v. Johnson, 1 Dessaus. 595.) After the strong proof of a marriage in fact between Col. Johnson and the Indian girl, deducible from his actions and conduct, his declarations made during his courtship of the widow Gooding, to the effect that he was a bachelor, &c., were undeserving of consideration. Yet in looking over the record it is plain that no evidence to disprove the marriage is to be found except these declarations. In Gaines v. Relf, 12 How. 534, the supreme court of the United States held this language: "The great basis of human society throughout the civilized world is founded in marriage and legitimate offspring; and to hold that either of the parties could, by a mere declaration, establish the fact that a marriage was void, would be an alarming doctrine."

III. The court below erred in finding that Johnson violated the marriage contract. The testimony warrants no such conclusion. The great effort on the part of the plaintiff was to prove the parsimony of Johnson, and that she was not indulged in the elegancies of dress. But the witnesses concur in saying that Johnson always kept up a decent domestic establishment, and the plaintiff, while living with him, was comfortable, contented and happy.

IV. But supposing that the marriage contract had been departed from by Johnson, a court of equity would do no more than give a fair compensation to the plaintiff. Surely there is no equity in enforcing so severe a penalty as is exacted in the present case.

V. There was error in awarding the plaintiff damages. She was entitled to none. The court below thought it was

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assigning dower. But dower had been expressly waived by the plaintiff. Her right, on her own showing, was *as an heir* under the law and not as dowress. She claimed one-half of the estate on the footing of an ordinary heir. The estate had been all the while in the custody of the legal administrator, who managed it for the benefit of all concerned. As against the proprietors of the other half of the estate, she was no more entitled to claim damages than she was liable to pay them.

*S. T. & A. D. Glover and Richardson*, for respondent.

I. This court decided when this cause was here before that by plaintiff's petition she was legally entitled to dower in the lands mentioned; that the marriage contract did not constitute a legal bar to dower within the provisions of the statute law of this state; that it vested in plaintiff no estate; that there nevertheless was such a thing as an equitable jointure; that something more than a mere agreement is necessary to complete it; that, in short, defendants had no legal defence; that they might have an equitable defence; that if they could show that the marriage contract had been performed, then they would have a right to demand of plaintiff the release of her dower, that is, they would then be entitled to a specific performance of the marriage contract against the plaintiff. It was also suggested that such a defence must be made with a tender of what moneys had been received by the husband from the wife. The defendants made out no case for specific performance. The plaintiff's right is unquestioned, and defendants are called upon to show some affirmative matter whereon to compel her to give it up. They simply ignore the allegations of the petition. They admit that \$3,500 were received as stated in the will; this they are ready and willing to pay; they have the money, but do not pay and will not pay. The answers made no showing of any equitable title in defendants to plaintiff's dower. The defendants rest their case on negative and not affirmative matter; persisted in treating the case as one in which plaintiff must show her

right to dower, not as one in which the defence was bound to show that Johnson in his lifetime, and they since, had done what they ought in relation to the marriage contract. They admit that Mrs. Johnson had and still has due to her large sums of money on the contract which they could pay and will not pay to her. The evidence shows that Johnson trifled with his agreement with his wife touching her dower, and conducted himself in gross bad faith. He appropriated \$5,801 of her money, used it in improving his land, made no account of it, and denied it, put the denial in his will, admitted only \$3,500 out of the amount, without interest at the end of twenty-four years, and attempts to force that on her in lieu of dower and other claims, not even that, but an annuity of about four hundred dollars per annum for a life after sixty years.

II. The instruction given to the jury with respect to the marriage of Johnson to the Indian woman was correct. (Bishop on Marriage & Divorce, 32; Shelf. on Mar. & Div. 1.) The defendants' instructions were properly refused. They were erroneous. There was no evidence tending to show that the Indian woman was a wife. The facts in evidence if accompanied by a separation of a marriage, would be evidence of a marriage. (2 Stark. Ev. 510; 2 Greenl. Ev. § 462.)

III. The offer to pay with no money in court was no tender.

IV. The instructions asked on the assessment of damages by the defendants were all improper.

NAPTON, Judge, delivered the opinion of the court.

This case was here before on a demurrer to the petition, and the decision of the court will be found reported in 23 Mo. 561.

When the case returned to the land court, an answer was filed by the adult defendants, setting up the antenuptial settlement as an equitable bar to the claim for dower, and denying the several charges, made in the petition, of breaches of the contract and general bad faith on the part of Johnson,

and offering to pay the amount of money received by Johnson from his wife upon their marriage, as specified in his will, and whatever additional money might appear upon investigation to have belonged to the plaintiff originally, and to have been received by the testator.

This part of the answer, which tendered compensation of breaches of the antenuptial contract in the event that such breaches should be found by the court, was stricken out, and the court directed an issue to be tried by a jury: "whether John W. Johnson died without descendants in being capable of inheriting his estate." This issue was found, under instructions from the court, for the plaintiff, and the court, proceeding to a final hearing of the cause, found all the facts in conformity to the allegations of the petition, and gave judgment for the plaintiff, in accordance with her claim under the third section of the act of 1845 concerning dower, for one-half in fee of all the deceased husband's real estate subject to his debts. After commissioners had been appointed to admeasure dower under this judgment, and had reported, a final judgment was entered to the same effect, and damages were assessed at \$7,420.11.

The question of most importance, which presents itself in the outset of this case, is the one which arises upon the instruction given to the jury upon the trial of the issue of legitimacy. That instruction is, "unless the jury find that John W. Johnson, and the Indian woman with whom he cohabited, mutually agreed to live their whole lives together in a state of union as husband and wife, it was not a marriage, nor are the children of such union capable of inheriting from the father."

Col. Johnson, it appears from the testimony taken at the trial, was a government factor at Prairie du Chien in 1812, at that time a military post in the Indian country, and outside of the limits of any state. Whilst there, he formed a connexion with an Indian woman, the daughter of a chief named Keokuk, with whom he lived for several years, and by whom he had three children, daughters, named Rosella,

Mary and Eliza. These children were brought up and educated by Col. Johnson in conformity to his circumstances and condition in life; were introduced into society, after their education was finished, as his daughters; remained inmates of his household after his removal to St. Louis in 1822, up to the period of their marriage, and were in all respects treated by him as a father would be expected to conduct himself towards his legitimate children, and were finally provided for in a will, which left to them or their descendants the bulk of his fortune, which amounted to about one hundred thousand dollars.

Shortly after his removal to St. Louis, Col. Johnson married the plaintiff, having left the mother of these children with her tribe, and it not appearing from the testimony whether she was living or not at the time of the marriage with the plaintiff. Some testimony was given at the trial explanatory of the custom of the Indians in relation to their marriages. It seems that there were connexions formed between the traders and the Indian women, which were regarded as marriages, and others which the witnesses did not so consider. What were the characteristics which distinguished the one from the other did not very clearly appear; but there was no evidence that in either case the husband was not regarded as at liberty to leave his wife at his pleasure. Some of the witnesses testified in relation to the ceremonies which sometimes accompanied a marriage. There was no evidence in relation to the origin of the connexion between Col. Johnson and Tapissee (the woman with whom he lived), nor did it appear what the nature of the contract was between them, except as it was to be inferred from the facts stated above.

There is doubt that *permanency* enters into the idea of marriage as understood among all civilized and christian people, and the proposition stated in the instruction of the land court is undoubtedly well sustained by writers who have discussed the subject of marriage. It may be further conceded that, even by the law of nature, a mere casual commerce between the sexes does not constitute a marriage. But when

there is a cohabitation, by consent, for an indefinite period of time, for the procreation and bringing up of children, that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, may safely be presumed to be, as it is termed by some writers, "a marriage in the sight of God." (Selford on Marriage & Div. p. —.) "It has been made a question," says this author, "how long the cohabitation must continue by the law of nature, whether to the end of life. Without pursuing that discussion, it is enough to say that it can not be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature in the intentions of the parties." (Id. p. 9.)

If permanency is to be regarded as an essential element of marriage by the law of nature, it is clear that all such connexions, which have taken place among the various tribes of North American Indians, either between persons of pure Indian blood, or between half breeds, or between the white and Indian races, must be regarded as a mere illicit intercourse, and the offspring be considered as illegitimate; for it appears to be well established by historians and travellers, as well as by the reported testimony in judicial proceedings occurring in the courts of some of our states, that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure. In a work published by Mr. Schoolcraft concerning the manners and customs of the North American Indians, under the authority of the government of the United States, the writer says: "The marital rite is nothing more, among our tribes, than the personal consent of the parties, without requiring any concurrent act of a priesthood, or magistracy, or witnesses; the act is assumed by the parties without the necessity of any other extraneous sanction except parental consent. Presents are, however, often made, if the parties are able. *It is also disannulled and the wife dismissed from the wigwam whenever the husband pleases, or the marital state is continued under the evils of discord or a state of polygamy. The*

latter is however the usual method among the hunter and prairie tribes. But the ties of consanguinity are still strictly acknowledged; children become possessed of all their natural rights, and family tradition traces these to their remotest links." In Robertson's History of America, (book 4,) the same peculiarity is noticed as characterizing the contract of marriage as it prevailed among the natives of South America.

In the case of *Wall v. Williamson*, 11 Ala. 839, it appeared in evidence that, by the Choctaw law, the husband could dissolve the relationship at pleasure, and a marriage of this kind, within the limits assigned to that tribe, was held valid. The court says that "marriages among the Indian tribes must be regarded as taking place in a state of nature; and if, according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract. Either party may take advantage of this term, unless it be expressly or impliedly waived by them; or they may perhaps acquire such relations to society as will give permanency to the contract and take from them the right to avoid it." The same doctrine had been held by the court in the same case, reported in 8 Ala. p. 48.

In Tennessee, a marriage among the Cherokees, according to the usages of that tribe, within the limits of that state, was held valid. And it appeared that all that was necessary to constitute a marriage by these usages was a public agreement to live together as man and wife, and the fact that two persons did so live together was considered evidence of such agreement. In this case (*Morgan v. McGhee*, 5 Humph. 14,) the husband was a white man, and there were children of the marriage, and the supreme court, in passing on the case, observe: "To hold this marriage to be void would be to vitiate all the marriages made in the nation, (Cherokee,) and might be productive of much mischief." Proceeding, therefore, on the principle that the courts in Tennessee would recognize as valid all marriages of a foreign country made in pursuance of the forms and usages of that country,

they applied the doctrine to a marriage between a white man and an Indian, made within the Indian nation, conformably to the customs of the tribe.

Judge Story, in his work on the Conflict of Laws, considers marriage, as in its origin, a contract of natural law; that "it is the parent and not the child of society;" that in all civilized countries it becomes a civil contract regulated by law, and in many has superadded to it a religious obligation. So that the contract is a natural, civil or religious one, or embraces all these elements, according to the condition of society in which it occurs. It is plain that, among the savage tribes on this continent, marriage is merely a natural contract, and that neither law, custom or religion has affixed to it any conditions or limitations or forms other than what nature has itself prescribed. It can hardly be said that the power of divorce, in one or both of the parties to the contract, at his or her pleasure, is inconsistent with the law of nature. The fact, as we have seen, is otherwise. To what quarter shall we look for proofs of the law of nature, if we exclude the manners and customs of the American aborigines?

It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere. (Story's Conf. of Laws, § 113; 2 Greenl. Ev. § 460.) It is equally clear, both upon authority and upon general principles of public policy and natural equity, that where the legitimacy of children is called in question, especially after their death and after a great lapse of time, every reasonable presumption is indulged in favor of legitimacy. Very slight circumstances have been held sufficient to authorize a court or jury to find the existence of a marriage. In the case of *Johnson v. Johnson*, 1 Dessaus. 595, the testator had used an expression in his will which had a tendency to create a doubt as to his son's legitimacy; and the only proof to remove the suspicion was the simple fact that the father and mother had lived together as husband and wife, and were so considered in the neighbor-

hood. Thirty years had elapsed, and all the parties were dead, and the illegitimacy of the son would let in the collateral relations of the deceased. The court of Chancery declared that "to bastardize a person after his death was contrary to every principle of law, justice and equity," and decreed accordingly in favor of the legitimacy of the son.

Where there has been a marriage *de facto*, and the parties to it are dead, although no direct proceeding can ever be had to invalidate it, yet if children have sprung from the union, the question of their legitimacy may incidentally and necessarily involve the validity of the marriage. Our statute has however, even in such cases, precluded the necessity of any inquiries of this sort, by declaring the issue of all marriages deemed null in law to be legitimate. Under our law, upon an issue of legitimacy, the inquiry is limited to the mere fact of actual marriage; and upon this investigation, confining ourselves to the rules of evidence established before this significant change in the law, the jury are bound to make every intendment in favor of the legitimacy of the children not necessarily excluded by the proof. (*Senser et al. v. Bower and wife*, 1 Penrose & W. 452.) In the case of *Cheseldine, lessee, v. Brewer*, 1 Harr. & McH. 152, upon a question of legitimacy, the jury were instructed that if they found the reputed parents of the person claiming as heir had consented and agreed to be man and wife and had cohabited as such before the birth of the claimant, they should render their verdict for the plaintiff, and this direction of the court was sustained upon appeal. The supposed marriage had occurred in the state of Maryland, and of course, if it had in fact taken place, had been accompanied with the ceremonies and attended with the sanctions, civil and religious, which the laws of that state required.

The separation of Col. Johnson from the mother of his children can not, under the facts of this case, be regarded as tending to rebut the proof of a marriage. Such a separation, in ordinary cases, occurring between persons of the same race and in a civilized country, is undoubtedly compe-

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tent evidence to rebut the presumption arising from previous cohabitation. (*Senser v. Bower et al.*, 1 P. & W. 452.) But the fact here, if established to be consistent with the usages among the Indians, not only in reference to their own marriages, but to intermarriages with the traders who sojourned with them, could have no tendency to overthrow the presumption arising from the previous cohabitation. It seems to be a right conceded to the husband by the terms of the contract, and its exercise can not therefore be regarded as inconsistent with it.

The declarations of Col. Johnson, reported by some of the witnesses, as made upon the eve of and perhaps subsequently to his marriage with the plaintiff, that he was a bachelor, are not entitled to any consideration. Such expressions are readily accounted for without being understood as indicating an intention to bastardize his children—an intention contradicted by all the acts of his life in reference to these children. His assumption and performance of parental duties, his care in providing for their education, his introduction of them into his household after his marriage with the plaintiff, their recognition in the social circle in which he moved, their marriage as his daughters, the liberal provisions for them in his will, and his solemn recognition of them in that instrument; all these circumstances, without any question, so far as the testimony shows, being ever made of their legitimacy during the life of the father, certainly constitute presumptive evidence of a marriage, when its existence is questioned nearly fifty years after it is alleged to have taken place, and when two of the children are dead leaving heirs, and the father is dead without any other children, and his widow is also dead without children, either by her first or second husband.

We have not been able to perceive any good reason for striking out a portion of the defendant's answer; but as the entire evidence in support of the defence is now before this court, the question becomes immaterial. We are satisfied, from the testimony, that the conduct of Col. Johnson has not

been such, in reference to the antenuptial agreement with the plaintiff, as to justify a specific performance of that agreement with a view to her exclusion from her legal right to dower. We do not allude to any charges of supposed illiberality to his wife during their marriage union, for there is no good ground for concluding that there was any serious disagreement or ill-feeling between them ; but the provisions of the will were certainly inadequate, and not a *bona fide* execution of the contract. And as the testator, whether by the consent of his wife or not, thought proper so to invest the money received from her on the marriage, as to be entirely inaccessible to her for any of the uses contemplated by the antenuptial agreement, and it would be extremely difficult, if not impracticable, to trace the fund so used in the improvement of the testator's real estate, and ascertain its present value, we concur in the conclusion of the land court that the right to dower was not barred.

It will be seen that, in our view of this case, the question of damages becomes immaterial. The death of the plaintiff having been suggested since the case came here, her representatives would be entitled to one-third of the rents and profits of the real estate of which her husband died seized, from the time of his death to the date of the assessment ; together with such proportion of the slaves and personal property of the husband as they may be entitled to under the second section of the act of 1845 concerning dower. It is not intended by this opinion to debar the plaintiffs from taking under the antenuptial agreement, but, as the bill is not framed with that view, we consider it unnecessary to notice that branch of the subject.

The judgment is reversed and the case remanded. Judge Scott concurs.

## THE STATE, Respondent, v. GAZELL, Appellant.

1. If a person take and lead away a horse any distance with a felonious intent, the asportation is complete and he is guilty of larceny, although the horse is not removed from the enclosure or lot in which he is at the time of such felonious taking and leading away.

*Appeal from St. Louis Criminal Court.*

C. C. Carroll, for appellant.

I. There was no legal *asportavit* proved. The fourth instruction given by the court is erroneous. The court plainly tells the jury that a larceny had been committed, the very thing they were called upon to decide. The instruction more than revives the rigor of the old common law. It tells the jury that no matter whether the property be taken away from the possession of the owner or not, still the felony is complete, if the man tried to steal but did not steal. The horse was not carried away from any place. There was a high fence around the place, and egress therefore was impossible without taking down that fence. Not a log of it was taken down. (Rex v. Cheny, 2 East. P. C. 556; Anon. 2 id. 556; Rex v. Wilkinson, 1 Hale, 598; 2 Russ. 96, 6; State v. McDowell, 1 Hawks, 449; State v. Carr, 13 Verm. 571.)

Mauro, (circuit attorney,) for the State.

I. The instruction declared the law correctly. (2 Arch. C. Pl. 362, note; Whart. C. L. 655; State v. Carr, 13 Verm. 571.)

SCOTT, Judge, delivered the opinion of the court.

The defendant was indicted for horse-stealing, convicted and sentenced to the penitentiary. On the trial it appeared in evidence that the horses were in an enclosure. A witness testified that he saw a man leading one of the horses with something on him—a bridle or line. The court instructed

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the jury that "if the defendant took or led the horse away any distance with a felonious intent, then the asportation is complete, as much so as if the party had succeeded in removing the horse away altogether, and in such case it makes no difference that the horse or horses had not been removed from the enclosure or lot in which they were at the time of the larceny." This instruction was excepted to.

The least removal of the thing taken from the place where it was before is a sufficient asportation, though it be not quite carried off. As where one takes a horse and is arrested in the act of leading him from the enclosure of the owner, or where one takes goods in an inn and carries them into the hall with an intent to steal them and is apprehended before he gets out of the house, he was adjudged guilty of larceny. So where one takes plate from a chest and lays it on the floor and is surprised before he can carry it away, or removes goods from one end of a wagon to the other but is detected before he gets them out, the offence is complete and he is guilty of larceny. (2 East. P. C. 555-6.)

The judgment is affirmed; the other judges concurring.

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PICKER, Respondent, v. HAIDORN *et al.*, Appellants.

1. The admission of testimony that is merely irrelevant, and which could not have influenced the jury in forming their verdict, is no ground for the reversal of a judgment by the supreme court.

*Appeal from St. Louis Land Court.*

The facts sufficiently appear in the opinion of the court.

*Krum & Harding*, for appellants.

*I. Z. Smith*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action by the respondent to divest the title of the heirs of William Haidorn, deceased, in a certain lot of

ground in the city of St. Louis, and vest it in the plaintiff, who claimed to be the grantee of one John Schreiber.

The petition alleges substantially that the appellants, defendants below, are the children and widow of William Haidorn, deceased; that about the 2d of January, 1844, one John Schreiber purchased of Nicholas DeMenill a lot of fifty-one feet front on Main street, by eighty feet in depth, in block forty-one; that at the time of the purchase Schreiber was largely indebted to William Haidorn, and to secure the payment of his indebtedness to Haidorn caused said lot to be conveyed to him by deed dated 2d January, 1844, executed by DeMenill and wife; that said deed is absolute on its face, but intended only as a deed of trust, to be held in trust by said Haidorn to secure him the sum of money so due him, and that said Schreiber reserved to himself the right to redeem the same upon the payment of the money due to Haidorn, a copy of which deed is filed with the petition; that it was agreed at the time between Schreiber and Haidorn that Schreiber might redeem the lot upon such payment, and that Haidorn would convey all his interest by deed in fee to Schreiber; that Schreiber paid all the consideration money for said lot to DeMenill that was to be paid at that time, and for the balance of the purchase money Haidorn executed his note of even date with the deed for \$733.83, payable in eight months, secured by deed of trust by Haidorn to DeMenill's trustee; that no part of said note was paid by Haidorn, but that part of the same was paid by Schreiber and the balance by plaintiff, and that all the purchase money has been paid; that Haidorn paid no part of the purchase money, and had no other interest than that of a mortgagee; that before the 1st January, 1853, Schreiber paid Haidorn all the money he owed him and all that said conveyance was made to secure, and that Haidorn failed to make such conveyance; that Schreiber took possession of the lot and exercised all acts of ownership, and expended to the amount of one thousand dollars in improving the lot, rented out the lot and buildings erected by him, and received the rents and

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paid the taxes—all with the knowledge and consent of Haidorn, without accounting to him; that he so remained in possession exercising ownership until Haidorn's death in July, 1853, and continued in possession and ownership until October, 1853, when he conveyed all his interest to the plaintiff by deed of that date; that when the lot was conveyed to plaintiff he took possession and placed tenants in it who paid him rent, and that his tenants still occupy it; that plaintiff also improved the lot and paid general taxes and a special tax of nine hundred and eighty-four dollars on the lot.

The defendants put in a formal answer denying all the allegations in the petition. The court directed the following issues to be tried by the jury: 1. Whether Schreiber procured the deed of DeMenill and wife of January 2, 1844, to be made to Haidorn in order to secure to him the payment of a debt which he (Schreiber) then owed Haidorn. 2. If the jury find that the deed was so made, then whether the debt so secured by said deed has been fully paid.

The petition does not allege any specific amount of indebtedness from Schreiber to Haidorn, and the transactions out of which it seems to have arisen were through a course of several years of mutual dealings between the parties; and the evidence bearing upon the question of payment consists, for the most part, of admissions by Haidorn and various facts and circumstances, rather than any direct evidence.

The purchase of the property from DeMenill, the conveyance to Haidorn, and the deed of trust by the latter to DeMenill, were all in 1844. Schreiber remained in possession after the deed was made, and continued to hold it as long as Haidorn lived, and afterwards until he (Schreiber) sold to plaintiff in 1853, who also entered into and still holds possession. It appears from DeMenill's testimony that the whole of the consideration of the deed from him to Haidorn had been paid by Schreiber, and the most of it in work. Haidorn, it appears, was a blacksmith, and did the work of Schreiber in that line for a number of years, from 1839 or '40 to 1846, or thereabouts; and there was evidence relating

to settlements between them during this period. There was evidence also of Schreiber's indebtedness to Haidorn in 1846 or 1847 for money loaned, which was to have been paid by a deed of the Gravois property. It also appears that in 1848 Schreiber conveyed a farm on the Gravois road to Haidorn for the consideration of five thousand dollars, which was subject to an encumbrance of some twelve thousand dollars, and which, as stated by one of the defendant's witnesses, was worth at the time of the sale from three to five thousand dollars over the mortgage by which it was encumbered. There was evidence of Haidorn's admissions in 1848 that the debt owing by Schreiber was settled when he (Haidorn) took a conveyance of the farm on the Gravois road, and of his willingness, after he had received the conveyance and taken possession of the farm, to execute to Schreiber a deed of release to the property in controversy.

Exceptions were taken to the ruling of the court in excluding and admitting evidence on the trial; and first, in admitting evidence relating to the possession of the property by Schreiber, receipt of rents, making improvements, paying taxes; and that in his settlement with Haidorn no account was taken of these things. Such acts are usually certainly indicative of ownership in fee, and in themselves considered would tend to prove that Haidorn had no claim to the property in controversy. If it be assumed, however, that the fact of a mortgage had been established by other evidence, it may be conceded that these acts are not necessarily inconsistent with the relation of mortgagor (in possession) and mortgagee; and, although in this view not strictly relevant to the issue of payment, we can not see how the jury could have been misled or the defendant prejudiced by this evidence. In our view of the facts, upon a careful examination of all the evidence, we are of opinion the evidence objected to could have had no influence upon the jury in forming their conclusion, and that the verdict would not have been different had it been altogether excluded.

The ruling of the court in excluding the deed of trust

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from Haidorn to Miller, as trustee of Miller, dated in 1853, is also assigned for error. The deed of Schreiber to Haidorn of 1848 was read on the part of the plaintiff without objection, and if it were good evidence for any purpose it tended to prove a satisfaction of the indebtedness from Schreiber to Haidorn, which was secured by the deed from DeMenill to him in 1844; and if so, the deed of trust of 1853, offered by the appellants, was obviously inadmissible; for it was conceded that the Gravois farm was encumbered to the amount of some twelve thousand dollars, and it is not pretended that this fact was unknown to Haidorn when he purchased it. What object could Haidorn have had in buying the farm and assuming the debt with which it was already encumbered, if nothing was to be realized after satisfying or discharging the liens. The question, however, was not what the *value* of the farm was, after paying the encumbrance for which it was liable; or whether Haidorn made a good or a bad bargain in buying it; or what *part* of Schreiber's indebtedness was discharged by this conveyance. There was evidence tending to show that the parties considered this conveyance a satisfaction of the debt and mortgage; that after it had been executed and Haidorn had taken possession under it, he considered the accounts between the parties settled and recognized Schreiber's right to a release of the property sued for, and it was therefore unimportant to go into an inquiry as to the real value of the farm as compared with the price it was sold for. Besides, the deed of trust offered in evidence was given four or five years after the conveyance of the farm to Haidorn by Schrieber, and purports to secure an amount larger than the encumbrance at the time of the sale, which was owing probably to an accumulation of interest in the mean time. It is urged here as a reason for admitting this deed that the Gravois property was involved in doubt, and was encumbered to a large amount, which Haidorn assumed; that this deed was made by Haidorn to secure the debt, and that it would have tended to prove that he (Haidorn) paid and assumed to pay for that property all

that it was worth, and thus rebut the presumption that any part of Schreiber's indebtedness to him by the deed of 1844 was canceled by that transaction. It is not reasonable to conclude that Haidorn would have taken a conveyance of the property if he knew it to have been encumbered for its full value simply for the purpose of discharging this encumbrance, and of incurring the trouble and expense incident to it, without the expectation of deriving any benefit from it. Besides, the argument is inconsistent with the transaction as the parties themselves viewed it, as the testimony in the case discloses it, especially that of Klein and Koezle; for Klein states that Haidorn admitted in 1848, after the conveyance was made of the Gravois property, that it was a settlement of the indebtedness; and Hoezle swears that Haidorn bought the farm for five thousand dollars. This is also corroborated by Wenger, one of defendant's witnesses, who says the farm was worth from three to five thousand dollars more than the amount for which it was mortgaged.

The refusal of the court to give the two last instructions asked by the appellants is assigned for error. These instructions are embraced substantially in those given. There were but two questions to be determined, and which were submitted to the jury in the issues directed by the court, namely: First, whether Schreiber procured the deed from DeMenill to Haidorn to be executed for the purpose of securing the debt due from Schreiber to Haidorn; and second, whether, if so, said indebtedness was fully discharged. These points are fully and clearly presented to the jury in the instructions given by the court at the instance of the plaintiff and defendants, and obviously exclude from their consideration any indebtedness incurred by Schreiber subsequent to the deed of 1844; for the jury are told, there can be no recovery by the plaintiff unless they find that the debt for which the deed in question was given to secure was fully paid by Schreiber; thus clearly throwing out of view any subsequent debt, as if it had been expressly negatived as in the terms of the instructions refused.

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It is further objected to the phraseology of one of the instructions given, that the precise amount of the debt owing was immaterial, provided the jury were satisfied the indebtedness, whatever it may have been, was fully paid. The objection assumes that there could be no proof of the payment of an indebtedness without first ascertaining the existence of a debt of a specific sum, and that a fact material to the issue was thus withdrawn from the jury. There was only a formal answer to the petition, denying all knowledge of the truth of its allegations, and no specific sum or debt was mentioned in the petition, or claimed to be due to the defendants in their answer. Whether the debt was large or small was quite immaterial to the issue, provided the sum, whatever it may have been, was paid. This was the issue submitted to the jury, was one of the two material facts to be determined, and the plaintiff was not held by the pleadings to any more precise proof than this. If a creditor admits he has been paid all the debtor owes him, or if this is shown by facts and circumstances, although there is no evidence of how many dollars the debt consisted, it could scarcely be said such proof would be insufficient to discharge the claim, or that to give it such effect the precise sum must first be ascertained.

Judgment affirmed; the other judges concurring.



## SHAW, Plaintiff in Error, v. NICHOLAY, Defendant in Error.

1. A testator can not, by devising his lands away, deprive his executor of the power of sale for the payment of debts.
2. In order to make a continuous adverse possession in successive occupants, so as to enable an occupant of land to avail himself of the possession of a preceding occupant, there should be some privity between them; the entry of the succeeding occupant must be with the consent of his predecessor, evidenced by contract, or by an act of the law passing the estate from the latter to the former.
3. A. died in possession of and claiming title to a block of ground, and devised the same to his widow. Paramount title to said block was in B. The

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widow, who, with another, were appointed executrix and executor of the will, made a compromise with B.—said widow and her co-executor conveying to B. one-half of the block, and B. conveying to the widow the other half. The probate court granted its consent to the making of this compromise on the application of the co-executor. Afterwards an order of sale was made by the probate court, and the widow and her co-executor sold and conveyed to C. all the right, title and interest which A. had in and to that portion of said block quitclaimed by B. to the widow of A. This sale was made for the payment of debts. After the death of A. the widow remained in possession of said ground up to the sale to C. *Held*, that the possession of A. was an interest in said block; that the widow, under the circumstances, could do no act by which the rights of creditors would be prejudiced; that she could not defeat the estate provided for the payment of debts, which would be done by annexing her possession as devisee to the title acquired from B.; that the sale by the executors to C. transferred the possession held by the devisee under the will, and that C., in making out a defence to an ejectment by the widow founded on the title acquired by her by virtue of the compromise with B., might connect his possession after the executors' sale with the possession of the widow previous to and after the compromise, and with that of A. previous to his death.

*Error to St. Louis Land Court.*

This was an action in the nature of an action of ejectment to recover possession of an undivided third of the south half of block No. 204 in the city of St. Louis. The suit was instituted May 7, 1857, by Octavia Shaw. The defendant denies plaintiff's right, but admits possession as alleged, and asserts that he holds possession as tenant of Benoist, Page and the heirs of James Gordon. The defendant further says that prior to the death of Lyman B. Shaw, husband of plaintiff, said Benoist, Page & Shaw claimed to own said block No. 204; that the Board of the President and Directors of the St. Louis Public Schools also claimed to own the same; that said Shaw dying, devised his interest to plaintiff; that letters testamentary on his estate were granted to Franklin L. Ridgely and plaintiff; that said Benoist and Page (said Ridgely as executor, and said plaintiff as executrix and devisee) agreed with said School Board to compromise their conflicting interest in said block, the said Board to convey to said Benoist, Page and the representatives, devisee of said Shaw, their interest in the southern half, and said Benoist, Page,

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and said plaintiff as devisee of said Shaw, to convey to said Board their interest in the northern half, of said black; that in accordance with said agreement the School Board, on the 9th of December, 1845, passed a resolution to that effect; that on the 15th of December, 1845, said Ridgely, the acting executor, presented his petition to the St. Louis probate court, asking that the executors of said Shaw might be allowed to make said compromise; that the board authorized said executors so to compromise; that on the — day of December, 1845, said compromise was effected, said Benoist, Page, and said plaintiff, in whom was the legal title to said Shaw's interest, conveying to said Board all their interest in the northern half of the block, and said Board conveying to said Benoist, Page, and said plaintiff, as being the devisee of said Shaw, the southern half thereof; that on the — day of —, 1846, the said Ridgely and plaintiff, as executor and executrix, presented their petition to the St. Louis probate court asking that the interest belonging to the estate of said L. B. Shaw, being an undivided third of the south half of said block 204, be sold for the payment of debts; that in March, 1847, the court made such order of sale; that on the first Monday of June, 1847, said Ridgely and plaintiff, in accordance with said order of sale, sold said interest of an undivided third belonging to the estate of Shaw, and James Gordon became the purchaser, and on the 10th of April, 1848, received the deed of said Ridgely and plaintiff therefor; that said Octavia Shaw never had or held any interest or estate in any portion of said block 204 except what she acquired as devisee of said L. B. Shaw, and it was the interest she thus acquired and none other that she released to the Board of Public Schools; that no consideration for the deed of said Board to Benoist, Page and plaintiff was given other than the release to said Board of their interest in the northern half of said block. Defendant insists that the whole estate and interest in said lot which belonged to said Shaw at the time of his death, as well as what was conveyed by the deed of said School Board to plaintiff, was passed

to and vested in said James Gordon, and that, by her acting and doings in that behalf, said plaintiff is forever estopped from setting up any title in herself derived under the deed of said Board to herself, Benoist and Page, if she ever had any.

At the trial the plaintiff introduced in evidence the survey of the United States of the block No. 204, and the documentary evidence showing a designation and assignment of said block to the City of St. Louis for the use of schools. The assignment was dated March 28, 1845; also the will of Lyman B. Shaw, dated October 7, 1845. By this will Shaw devised all his estate, real, personal and mixed, except certain small legacies, to his widow, the plaintiff, subject to the payment of his debts. He made Franklin L. Ridgely and the plaintiff executor and executrix of the will. Also the deed of the School Board dated December 12, 1845, conveying to Benoist, Page and plaintiff the south half of block. In this deed the plaintiff is made a party by her simple name Octavia Shaw, and no reference is made to L. B. Shaw or his estate.

From the testimony introduced by defendant, it appeared that Ridgely and plaintiff qualified as executor and executrix; that on the 9th of December, 1845, at a meeting of the School Board, it was resolved to accept the propositions for a compromise made by plaintiff, Benoist and Page; that by deed dated December 12, 1845, said parties conveyed to the School Board the north half of block No. 204. In this deed plaintiff is described as "heir and devisee of Lyman B. Shaw." On the 13th of December, 1845, Ridgely filed a petition in the probate court setting forth the desirableness of a compromise with the Schools; that the other parties besides Mrs. Shaw had agreed to the compromise and awaited her signature to a deed of release to the Schools, and praying the judge to enter an order advising such compromise, and allowing Mrs. Shaw to pass her interest to the Schools in the north half of the block. The petition was signed by Ridgely alone. On the 15th of December, 1845, the court made the order as prayed. On the 21st of December, 1846, the court

ordered the publication of the usual notice to parties interested, to show cause why at the next term of the court a sale of real estate should not be ordered for the payment of debts. In March, 1847, the probate court, on the motion of plaintiff and said Ridgely, as executrix and executor of the will of L. B. Shaw, made an order of sale of various lots and tracts of land for the payment of debts, including the interest now in controversy. On the 10th of April, 1848, said Ridgely and plaintiff, as executor and executrix, conveyed to James Gordon, in pursuance of a sale previously made by them under the above order in June, 1847, "all the right, title, claim and interest which the said Lyman B. Shaw, deceased, had of, in and to the said land."

The defendant also introduced evidence showing that at Shaw's death in 1844, said Shaw, Page and Benoist claimed said block as equal tenants in common by virtue of a deed executed by Antoine Smith and wife to Auguste Chouteau, dated June 15, 1818, and various mesne conveyances; that as early as 1840, or 1841, the persons through whom said Shaw, Page and Benoist claimed by said deeds had possession of said block, claiming the same adversely to all others; that this possession continued so; that, at the death of Shaw, he, Page and Benoist, had possession as tenants in common, and, after his death, and until said compromise was made with the School Board, said possession continued in said Page, Benoist and the representatives of Shaw. After the compromise they took and kept possession of the south half of the block. After the executors' sale Gordon took and held possession of said southern half with said Page and Benoist. The defendant is a tenant under the heirs of Gordon and Page and Benoist.

The court refused the two instructions or declarations of law asked by the plaintiff, one of which is as follows: "2. If the court find from the evidence that at the death of Lyman B. Shaw, he and Page and Benoist were in possession of block No. 204 of the city of St. Louis, embracing the land

in controversy, as tenants in common, claiming the same as their own adversely to all others; that the same was set-off to the Board of President and Directors of St. Louis Public Schools, by authority of the United States, as given in evidence; that the plaintiff was the devisee of said Shaw of his right and interest of, in and to the said block, and, after his death, together with said Page and Benoist, compromised with said Board their adverse claims to the same, whereby they conveyed all their right to the northern half of said block to said Board, and said Board conveyed all their right to the southern half thereof as shown by the deeds in evidence; and they and said Board then and under said conveyance occupied their respective halves thereof, then from that time ceased the possession by plaintiff, Page and Benoist of said southern half as adverse to said Board, and the possession thereof thereafter of plaintiff, Page and Benoist was without any claim thereto by said Board."

At the request of defendant the court gave the following instructions or declarations of law: "3. If the court finds from the evidence that the defendant is the tenant of the representative and heirs of James Gordon, deceased, for the undivided one-third of the lot sued for in this action; that said Gordon and his heirs, and those under whom said Gordon claimed title, have had the open, peaceable and quiet possession of the interest sued for more than ten years prior to the commencement of this suit, claiming the same under deeds purporting to convey such interest, and that such possession was adverse to the Board of President and Directors of the St. Louis Public Schools and all claiming said interest under them, then the court declares the law to be that the plaintiff can not recover. 4. The court declares the law to be, that the deed of Franklin L. Ridgely and Octavia Shaw to James Gordon, read in evidence by defendant, was effectual to pass to and vest in the said James Gordon the interest in and to the property therein described which said Octavia Shaw acquired by deed of the Board of President and Direc-

tors of the St. Louis Public Schools to Louis A. Benoist, Daniel D. Page, and said Octavia Shaw, read in evidence by plaintiff."

The plaintiff took a nonsuit, with leave, &c.

*A. Todd*, for plaintiff in error.

I. The sale and deed to Gordon did not vest in him the title acquired by Octavia Shaw from the Schools, nor was she estopped thereby from asserting this title against said sale and deed. By the will of Shaw she became entitled, as purchaser, to all the realty left by him. The compromise with the Schools vested in her the legal title in common with Benoist and Page. The consideration to the Board came from her, Benoist and Page, and from no other persons. The Schools' title was the only valid title. Mr. Shaw left no title. She acquired title under the deed of the Schools. The title thus acquired was not subject to the debts of the estate. The proceedings of the probate court were void for want of power. Octavia Shaw was not a party to them. She needed no advice or authority from the probate court to make the compromise. The sale to Gordon could only affect the interest of Shaw at the time of his death. This was only his possession thereof with Benoist and Page. It has no standing or continuance before the legal enforcement of the paramount title. Her joining in the deed with Ridgely to Gordon is not a bar. She acted as executrix. Nothing was taken from the estate of Shaw in making the compromise. Creditors were not injured. All the estate of Shaw was possession. This said compromise did not affect. The sale and deed to Gordon disposed of this possession in the south half of the block. Plaintiff gave a valuable consideration for her right under the will. She relinquished her dower. The debts have absorbed the whole estate, except the disputed possession of the north half of said block. This she conveyed to the Board. Her right under the will to the mere possession of the south half, Gordon has acquired under said sale and deed. There is left to her, then, no right to said south

half except under the deed from said Board. This right is absolute in her, and paramount over Gordon's mere possession. The allegations of the answer make no equitable bar.

*Shepley*, for defendant in error.

I. The deed of Ridgely and plaintiff to Gordon was operative to convey the title which plaintiff held as devisee under Shaw, and what she acquired by virtue of the compromise with the Schools. The acts of Ridgely in obtaining the consent of the probate court to the compromise are in law the acts of both. By the deed to Gordon it was intended to convey the title to the half block, whether as originally in Shaw or derived from the Schools. Even if she had not been an executrix and had not been a party to the deed to Gordon, yet, as a general devisee of Shaw, she stood in the position that a sale for the payment of debts took all her interest in the land. She was the only person who was interested in having the debts paid. Until that was done she could take nothing. She took, by her compromise, from the creditors their recourse upon the northern half of block for the payment of debts. The only consideration she paid to the Schools was the interest which belonged to the creditors in the northern half. A sale for the payment of debts carries title, whether the title be in an heir or devisee. (16 Ill. 318; 5 Mass. 240; 16 Pick. 107; 7 Texas, 210; 6 Ohio, 240; 16 Pet. 25.) The conveyance by the Schools was to Mrs. Shaw as devisee. It was to the interest of the cotenants of Mrs. Shaw and of creditors that the compromise should be made. The only person the Schools could convey to was Mrs. Shaw as devisee of Shaw. She did not receive it in her individual right merely. She took it as part of the assets of the estate.

II. Whatever title Shaw had at the time of his death certainly passed; if so, defendant acquired title under the statute of limitations. If there had been no compromise with the Schools, and they had commenced their suit when Shaw did hers, the Schools would have been barred. Shaw, Ben-

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oist and Page had held the land during Shaw's life adversely to the Schools, and tenants holding under a written lease from them occupied the land down to the time of the sale to Gordon. Here was a holding under the original title of Shaw; and if the sale to Gordon was only of that title, then Gordon succeeded to that possession as adverse to the Schools and of Mrs. Shaw as claiming under them. She will not be allowed to set up that she was in possession under the School title when she set up and sold the land and delivered possession as belonging to her husband's estate.

SCOTT, Judge, delivered the opinion of the court.

A testator can not deprive his executor of the power of selling his lands for the payment of his debts by devising them away. A devise no more affects this power than a descent in the course of inheritance. (*Carson v. Walker*, 16 Mo. 87.) This is the settled law in this state.

The plaintiff maintains the ground that, as devisee, she took the title to the lot in controversy her husband had at the time of his death, subject to a power of sale for the payment of his debts; that as executrix she could be compelled to exercise this power; that notwithstanding, if by virtue of this title, thus vested in her, she has been enabled to make favorable compromise in her own right, as devisee, with those holding a title adverse to that devised to her, such compromise enured to her own benefit, and was no concern of the creditors, who were still free to act as if no compromise had been made; that there is no such privity or relation of trustee and *cestui que trust*, which entitles the creditor to any advantage or profit the devisee may make by means of the title acquired by devise, which is always subject to the power of sale for the payment of debts, a naked power which can not be defeated by alienation or disseisin; that the Schools took it from her subject to this power, and if they have been wronged, the creditors have no right to complain or take advantage of it; and, it being a matter between her and the Schools, the Schools must look to her for any injury

she may have caused them by passing a title which was afterwards defeated; that the creditors, having a right to disregard the compromise, are not in anywise affected by it, and can not claim any advantage under it; that the title she passed under the order of sale made by the probate court for the payment of debts, was the title her deceased husband had at the time of his death, and her act in passing that title did not in any way affect or impair the title she acquired from the Schools for the benefit of those claiming under her deed as executrix conveying the land under the order of the court for the payment of debts.

While the plaintiff thus maintains that the title which she took as devisee, and which was the consideration for the compromise she made with the Schools for the lot in controversy, enures to her individual benefit, she must also be willing to grant that she, as devisee of her husband's title, could not affect the right of the creditors to have sold for the payment of debts such title as he had at the time of his death; nor by any acts of hers defeat that title when conveyed to a purchaser under proceedings for the payment of debts.

How, then, does the statute of limitations influence this case? We must keep in mind that we are to regard the matter as though the title of L. B. Shaw and that of the Schools were in different persons. In looking to the mere law of the case, uninfluenced by any equitable consideration—for the plaintiff has instituted an action at law to recover on the mere strength of her legal title—the title that Octavia Shaw asserts under the Schools is to be viewed as though it was used by any other person; and the fact that she, as executrix of her husband, sold his title to Gordon for the payment of debts, does not affect her right to recover in this action of ejectment. Octavia Shaw took L. B. Shaw's title under the will, in the whole of block No. 204. By a deed dated 12th December, 1845, the Schools conveyed to her their title to the south half of the block in consideration; that she had conveyed to them her title to the north half. The south half of the block is the lot in controversy. By the devise, the

tenant in possession at the death of L. B. Shaw became the tenant of Octavia Shaw. On the 10th of April, 1848, Gordon, under the statutory power of sale, became the purchaser of L. B. Shaw's title. That deed was executed by Octavia Shaw as the executrix of her husband, and conveyed all the right, title and interest which L. B. Shaw had in the lot in controversy at the time of his death. Although the deed to Gordon related back to the time of L. B. Shaw's death, so as to defeat all mesne conveyances, yet that deed conveyed title only from the time of its execution. From that time he had a right to the possession and might have maintained an ejectment.

Now can Gordon, in order to make out a defence under the statute of limitations, avail himself of the prior possession which commenced under the title which he purchased? Is there, under the circumstances of this case, any privity between the possession of Gordon and his heirs since the sale and that which existed at the time of L. B. Shaw's death? When Octavia Shaw acquired the School title, which was paramount to the title she held as devisee, did the possession to which she was entitled as devisee connect itself with the paramount title of the Schools, and thus break that continuity and privity of possession between the successive tenants which is necessary to make the defence of an adverse possession available? Suppose a stranger had purchased Mrs. Shaw's School title before she sold her husband's right, title and interest as executrix, and he had brought this suit; would Gordon or his heirs, as against him, have the right to plead the statute of limitations, relying on the possession of the husband at the time of his death? The tenant under Mr. Shaw, by his devise to Mrs. Shaw, became her tenant, and if she afterwards became the purchaser of a paramount title, would he hold under that title, and would the possession connect itself with that title? If, afterwards, the husband's title is by operation of law conveyed away, is there any privity and continuity of the possession of the purchaser

with the previous possession of the husband? This argument is based on the rule that, in order to make a continuous adverse possession in successive occupants, it is necessary that there should be some privity between them. When one occupant enters after another, it must be with the consent of his predecessor, indicated by contract or by an act of the law passing the possession from one to another, in order to make a continuous adverse possession. (*Chouquette v. Barada*, 21 Mo. 336.) But the answer to the argument is, that possession was the only title of the husband; that possession is an interest in land, is evidence of a fee, and, if it endures for a sufficient length of time without interruption, will be a perfect title. Though ordinarily, when there are two titles in one person, the possession will connect itself with the paramount title, yet Mrs. Shaw, under the circumstances, could do no act by which the rights of the creditors would be prejudiced. The law would not suffer her to do an act to defeat an estate provided for the payment of debts, which would be done by annexing her possession as devisee to the title which she acquired from the schools. If the Schools had brought this action, they would have been barred. A purchaser under the power holding in privity with the testator Shaw, his devisees and assigns, his possession, and that of all those claiming under his title, would have enured to Gordon or his heirs; and Mrs. Shaw, by taking the title of the Schools, could not deprive them of this advantage by claiming that her right to possession as devisee annexed itself to the title she acquired from them, and thus break that continuity of possession under L. B. Shaw's title necessary to make it available to Gordon and his heirs as a defence under the statute of limitations.

The foregoing contains our view of this matter as it is presented in this suit, considered only as an action of ejectment. Arriving at the conclusion we have, it will be unnecessary to determine whether the answer is sufficiently full in setting up the equity of the defendant so as to be available as a de-

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fence. We do not see how the deed to Gordon could create an estoppel at law, as it only professes to convey all the right, title and interest of L. B. Shaw at the time of his death. The facts of the case, set forth in answer as an equitable defence, might create an estoppel *in pais*, or an equitable estoppel. The application of the executors to the probate court for leave to compromise is a mere fact not influencing the case in its present aspect. The probate court had no jurisdiction to authorize the executor to make a compromise. (Lucas v. Bompert, 21 Mo. 598.) Though such an application, if proved as a fact, would have its influence in an equitable view of the subject, especially as it was followed by the further fact that the executors only sold so much of the land as was obtained by the compromise. In an equitable view of the subject, the failure of the plaintiff to disclose the information that the title she held under the Schools was a subsisting pretension, although her deed may have been recorded, would not be without its weight.

It will have been observed that in framing this opinion we have overlooked the interest of Page & Benoist in the lot in controversy. Their interest was not involved, and the mention of it would have served no other purpose than to embarrass it. It was thought therefore best to leave it unnoticed. The opinion, as written, would not have been the least changed, as to the effect of it, had the interest of Page & Benoist not been noticed.

The judgment is affirmed. The other judges concur.

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BLECKER v. ST. LOUIS LAW COMMISSIONER.

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1. If the error complained of in the proceedings of an inferior court can be redressed on appeal or writ of error, a mandamus will be refused by the supreme court.
2. Questions of jurisdiction as between the several courts of St. Louis county may be determined by the supreme court on appeal or writ of error.

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Blecker v. St. Louis Law Commissioner.

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*Application for a Mandamus.*

The facts of the case are sufficiently set forth in the opinion of the court.

*Coleman*, for applicant.

SCOTT, Judge, delivered the opinion of the court.

This is an application for a rule on the law commissioner to show cause why a mandamus should not issue against him requiring him to reinstate on the docket of his court an appeal from a justice's court which had been dismissed.

The suit was for rent, and was originally brought before a justice of the peace, from whose judgment an appeal was taken to the law commissioner's court, where it was dismissed for the reason that the commissioner was of the opinion that the appeal should have been taken to the land court. By law all appeals from justices of the peace are to be heard in the court of the law commissioner, except those (and those only) which relate to "land or any interest, claim or right therein," which are cognizable in the land court. Whatever may have been the extent of the exclusive jurisdiction of the land court prior to the act of 18th February, 1859, (Sess. Acts, 1859, p. 457,) we are of the opinion that the fourth section of that act which confers on the "St. Louis circuit and common pleas courts concurrent jurisdiction with the land court in all suits and actions except those for the direct recovery of the possession of real estate," has materially changed both the original and appellate jurisdiction of that court. As the policy of the law at first was to give the land court exclusive jurisdiction in those appeal cases from justices of the peace, the subject of which was matter of which the land court had exclusive jurisdiction in cases where the sum in controversy exceeded the jurisdiction of the justice, and as that policy is now abandoned and the jurisdiction of the land court in such cases is no longer exclusive but concurrent, there is no longer any reason for giving

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the land court appellate jurisdiction in those cases in which it possesses only a jurisdiction concurrent with the other courts.

As questions of jurisdiction, as between the several courts organized for St. Louis, are matters that can be determined on appeal or writ of error, we are restrained from issuing a mandamus on this application. Questions of jurisdiction between the several courts of St. Louis county have frequently been decided on appeals and writs of error.

The rule is refused. Judge Ewing concurs; Judge Napton absent.



TRUESDAIL, Appellant, v. SANDERSON, Respondent.

1. All the proceedings of a court of record are in the breast of the court during the term at which they are had, and may be modified or set aside; hence it is not regular, without leave of court, to take a transcript of such proceedings to be filed in the office of the clerk of the supreme court before the expiration of the term of the inferior court at which such proceedings are had; an appellant will not be in default who fails to file such transcript in the office of the clerk of the supreme court before the expiration of such term of the inferior court.

*Appeal from St. Louis Court of Common Pleas.*

For the facts of this case, see opinion below.

*Whittelsey*, for Sanderson, in support of motion to affirm.

*McClellan*, *Moody* and *Hillyer*, for Truesdail, appellant.

SCOTT, Judge, delivered the opinion of the court.

This is a motion to affirm a judgment because the appellant failed to file in the office of the clerk of the supreme court, at least fifteen days before the term of such court to which the appeal is returnable, a perfect transcript of the record and proceedings in the cause.

The judgment was rendered in the court of common pleas

of St. Louis county on the 30th day of January last. That court continued the session at which the judgment was rendered until the first of April following. In the mean time, on the third Monday in March, the supreme court commenced its regular session.

As all the proceedings of a court of record during the term at which they are had are in the breast of the court and may be modified or set aside, notwithstanding the time at which a motion for a new trial or in arrest of judgment may be made has elapsed, it is not regular to take a transcript of such judgment before the end of the term without leave of the court. We deem this a sufficient reason for not filing the record. Motion denied. Judge Ewing concurs; Judge Napton absent.



THE STATE, Respondent, v. SMITH, Appellant.

1. State v. Ramelsburg, ante, p. 26, affirmed.

*Appeal from St. Louis Criminal Court.*

*W. C. Jones*, for appellant.

*Mauro*, (circuit attorney,) for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an indictment for stealing in a dwelling-house personal property of less value than ten dollars. The defendant was found guilty and sentenced to the penitentiary.

The point in this case is the same as that decided in the case of the State v. Ramelsburg, decided at this term.

The judgment is affirmed; Judge Ewing concurring. Judge Napton absent.

McDERMOTT, Respondent, v. PACIFIC RAILROAD COMPANY,  
Appellant.

1. A servant, who is injured by the negligence or misconduct of his fellow-servant, can maintain no action against the master for such injury, unless the servant, by whose negligence the injury is occasioned, is not possessed of ordinary skill and capacity in the business entrusted to them, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master.
2. A servant of a railway company could not recover against the company for an injury caused by the falling of a bridge, unless such injury was caused by incompetent servants or agents of the company whose employment might be traced to the negligence of the company, or to a defect in the bridge attributable to the fault of the company.

*Appeal from St. Louis Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.

*S. T. Glover, R. S. Hart, Whittelsey, Thomas & Cox,*  
for appellant.

I. The petition is fatally defective. (Story on Ag. § 453; 23 Penn. State, 384; Angel on Carr. § 577; 3 M. & W. 1; Chitty on Carr. 355; Pierce on Railw. 286, 294; Redfield on Railw. 386; 20 Ohio, 415; 38 Eng. L. & Eq. 477; 5 Exch. 357; 19 Law Rep. 469; 6 Cush. 75; 37 Eng. L. & Eq. 286; 6 La. Ann. 495; 1 Barb. 231; 20 Barb. 450; 7 La. Ann. 321; 6 Ind. 208; 25 Ala. 695; 15 Ill. 550; 3 M. & W. 1; 1 McMullen, 385; 15 Georg. 349; 9 Cush. 112; 4 Seld. 175; 10 Cush. 228; 28 Eng. L. & Eq. 48; 11 Mo. 361; Stephen on Plead. 147; 3 Caines, 329; 2 Johns. Cas. 581; 36 Eng. L. & Eq. 486; 37 Eng. L. & Eq. 281; 38 id. 477.)

*Shreve, Boyce and McDonald,* for respondent.

I. The petition contained a good cause of action. (4 Seld. 175; 25 Ala. 657; 28 Eng. L. & Eq. 48; 33 id. 48, 19 Law Rep. 469; 1 Rob. N. Adm. 45, 131; 17 Pet. 20; Story on Ag. § 453; Pars. on Cont. 86, 93; 4 Metc. 60; 20 Ohio, 1, 415; 7 West. Law Jour. 369; 13 Law Rep. 74; 3

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McDermott v. Pacific Railroad Co.

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Ohio State, 201.) The judgment by default cured all the defects, imperfections or omissions of the petition. (R. C. 1855, p. 1256; Stephen Plead. 147.)

NAPTON, Judge, delivered the opinion of the court.

The principle of the common law, that a servant, who is injured by the negligence or misconduct of his fellow servant, can maintain no action against the master for such injury, seems to be established with great uniformity in England and by the current of authority in the United States. There are cases indeed decided in this country denying the principle entirely; (20 Ohio, 415; 3 Ohio St. R. 202;) but they must be regarded as exceptional ones. In some cases a distinction has been attempted aiming to exempt from the operation of the rule servants who are employed in a subordinate capacity, and strictly subjected to the orders of their superiors. There are certainly plausible grounds for such a distinction, if the sole object of the doctrine is to secure diligence and fidelity on the part of the servants. But as the rule is mainly based on general principles of public policy, and to some extent justified by the contract implied by nature of the relation between master and servant, this distinction seems not to have met with any favor, and the rule is applied in all cases alike, without regard to the degrees of subordination in which the different servants or agents may be placed with reference to each other. (Redfield on Railways, p. 387; Farwell v. Boston & W. R. 4 Metc. 49.)

If the agents, by whose negligence the injury is occasioned, are not possessed of ordinary skill and capacity in the business entrusted to them, it has been held that an action will be against the principal by the injured party, although he may be one of the agents or servants. But in such cases it is well settled by the English decisions that the employment of incompetent agents must be traced to the want of ordinary care on the part of the principal. (Tenant v. Webb, 37 Eng. C. L. R. 281.)

So it has been held that where unsafe machinery has been entrusted to a servant and an injury happens, the servant may recover damages from the employer if he knew of the unfitness of the machinery. (Keegan v. The Western R. R. Co. 4 Selden, 180.)

The petition in this case declares that the plaintiff was employed as brakeman on the cars of the Pacific Railroad Company; that the car on which he was employed, in running on a bridge or trestle-work over the Gasconade river, was precipitated into the bed of the river, the bridge being so frail as to be unable to bear the weight of the train; and that he received certain injuries which are described. It is further declared that the bridge was defective, and was received by the chief engineer or superintendent of the road; that the company were owners of the cars and bridge, &c., and were common carriers; that it was their duty to use common care and diligence in carrying passengers and the plaintiff as brakeman, but that they conducted themselves so negligently by their engineers, servants, &c., *that by reason of such negligence* the plaintiff received the injuries complained of.

Upon this petition there was a judgment by default and damages subsequently assessed.

The case is manifestly one which falls within the general rule we have referred to. There is no allegation that the company employed incompetent servants or agents, or that they failed to exercise ordinary care in their selection. The defects alleged to be in the construction of the bridge are not traced to any fault or misconduct of the company. It is the ordinary responsibility of a principal for the acts of his agent upon which the liability of the defendant is claimed, and we have seen that their responsibility is for the benefit of strangers, and can not be enforced by the agent himself. In our judgment, public policy requires that this distinction be maintained.

The other judges concurring, the judgment is reversed.

SOUTHERN HOTEL COMPANY, Respondent, v. NEWMAN, Appellant.

1. Acts of corporations may be proved in the same manner as the acts of individuals; if there be no record evidence, they may be proved by the testimony of witnesses.
2. *Held*, in a suit on a subscription to the stock of an incorporated company, that it was competent for the defendant to show by oral testimony, in the absence of record evidence, that the subscription list, upon which defendant's name appeared, was annulled and abandoned, and that another subscription was subsequently opened and made the basis of the organization of the company by the stockholders.

*Appeal from St. Louis Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.

*Garesché & Bakewell*, for appellant.

I. The court required an impossibility. It was impossible for the defendant to produce a record that did not exist, or to account for the absence of a record that never had an existence. It was competent for the defendant to prove by the corporators, or any one of them, facts which directly and by virtue of the provisions of the charter came within their knowledge, and of which there was no record evidence. Plaintiff's evidence showed that there was no organization prior to February 10, 1857, and there were no records or minutes prior to that date. The corporators had the right to abandon and annul the subscriptions obtained and open new books. The part payment of his subscription by defendant is of no importance as it was made under a mistake as to the facts.

*Currier*, for respondent.

I. It is a legal presumption that a corporation keeps records of its transactions. (4 Wheat. 424; 3 Metc. 282; 1 How., Miss. 479; 12 Wheat. 68; 10 Johns. 154.) Parol testimony could not be let in without first accounting for the absence of the record. No legal defence is set up in the

answer or offered to be proved. There was not in plaintiffs a right of rescission of the subscription. It could not be rescinded without the consent of both parties. The case shows that after the pretended rescission of the contract it was ratified and confirmed by the parties. On the 26th of June, 1857, defendant paid the assessment of fifty dollars on the stock. At later dates he impliedly admitted his liability.

EWING, Judge, delivered the opinion of the court.

The question in this case arises upon the offer of the appellant, (who was a subscriber to the capital stock of the Southern Hotel Company,) to prove by one of the corporators, Joseph Chambers—who was also a member of the first board of directors—that the subscription list, on which the witness' name appears as a subscriber for one hundred shares and that of the appellant for five shares, was opened and completed prior to the month of October, 1856; and that the said subscription was afterwards abandoned and annulled by the said corporators. This evidence, on the objection of the respondent, was excluded by the court, on the ground that the facts could only be proved by the record showing the action of the corporate authorities, unless the absence of such record was accounted for. To this ruling of the court the appellant excepted, and this is the only question the record presents for our consideration.

The answer alleges substantially that the corporators entered into an agreement for a lease of certain premises on which to erect their hotel, and commenced obtaining subscriptions to the capital stock; that they afterwards annulled the contract for a lease, and opened a new subscription book; and, when the new subscription was filled up to fifty thousand dollars, they organized the company on the 10th of February, 1857; that the appellant was a subscriber for five shares in the first opened book, which was set aside and abandoned, and never became a subscriber on the second on which the company was organized. He further alleges that the payment made by him on his subscription was under a

mistake and without knowing at the time that said subscription had been abandoned. The books and papers containing the proceedings of the stockholders and directors of the company were produced by the secretary—the first, consisting of the proposition of Mr. Gibson and a subscription list annexed, dated in April, 1856, and one of a subsequent date, October, 1856, being a modification of the former, to which is also appended a list of subscribers—and the other, the proceedings in the organization of the company and subsequent thereto. The name of the appellant appears on the first mentioned subscription paper, but not on the second; and it is admitted that all the proceedings of the corporators and directors, of which any record is preserved, appear in the books produced by the secretary. The record contains no evidence of the abandonment of the subscription on which the name of the appellant appears. If it had been abandoned or annulled, it could only be shown in the manner proposed by the appellant. It is not a question here whether, if there had been any record of such action, the parol evidence offered would have been inadmissible; for of that there would be no doubt. But the question is whether, supposing there was an actual abandonment of the first subscription, the defendant was at liberty to show it by the testimony offered. The charter constitutes the corporators therein named the first board of directors, any three of whom may at any time after the passage of the act cause books to be opened for subscription to the capital stock of said company, in such manner and at such times and places as they may see fit. These corporators would have no right to set aside or annul subscriptions at their pleasure, without the assent or acquiescence of the subscribers; but why may not the subscribers, before the rights of third persons have intervened, agree to abandon their subscription, and to regard it as no longer of any force or effect? Who is there to question their right to do so, or the manner in which it is to be exercised? If in any case, where the preliminary proceedings of the commissioners in opening books or taking stock

are not conformable to the charter or law, when the charter prescribes a particular course, (though it does not in the case before us,) or if from any other cause the subscribers and commissioners should agree to abandon the subscription and to consider their proceedings a nullity, surely it would be competent to take parol evidence of the fact in the absence of better, should it become necessary to do so.

Again, what is there in the charter or general corporation law requiring the proceedings of the corporators or directors to be matters of record? or does the validity of their acts depend upon their being made a matter of record? It is well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it as the most solemn acts done under seal; that they may make parol promises either by vote or through their authorized agents, and that such promises may as well be implied from its acts and the acts of its agents as by deed. (*Angell & Ames on Corp.* 237; 7 *Cranch*, —; 5 *Wheat.* 325. See also *Edgerly v. Emerson*, 3 *Foster*, 566.) In *Trustees of St. Mary's Church v. Cagger*, 6 *Barb.* 579, the trustees had passed a resolution submitting a proposition, which had been transmitted to and accepted by Cagger, but it did not appear from the record that the report, (adopted at a meeting of the trustees,) or any resolution thereon, had been adopted by the trustees; but the secretary testified that they were adopted. The admission of this evidence was assigned for error, on the ground that no such vote of the trustees being on record, secondary evidence could not be admitted to prove that such a vote had been actually passed. It was held to have been properly admitted. The objection was not put upon the ground that higher evidence existed on the minutes of the board of trustees; for it appeared affirmatively that no record was made of the vote adopting the report and resolutions. The court observes that formerly it was supposed that the acts of corporations could only be established by positive record evidence, and that no corporate act could be binding without being reduced to writing and bearing a cor-

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State, to use of Goldsall, v. Watson.

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porate seal; but these doctrines have long since ceased to be maintained by our courts. On the contrary, it is now perfectly well settled that the acts of corporations may be proved in the same manner as the acts of individuals. If there be no record evidence, they may be proved by the testimony of witnesses, and, even where no direct evidence of such acts can be given, facts and circumstances may be proved from which the acts may be inferred.

We think the court erred in excluding the evidence offered, and the judgment is reversed and the cause remanded.

Judge Scott concurs. Judge Napton absent.

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THE STATE, TO USE OF GOLDSALL, Appellant, v. WATSON  
*et al.*, Respondents.

1. Where a constable or other officer, previous to the levy of an execution, demands and obtains an indemnification bond of the plaintiff under the first section of the sheriff's and marshal's act of March 3, 1855, (Sess. Acts, 1855, p. 464,) he will be exempt from liability on his official bond at the suit of a claimant of the property levied on and sold other than the defendant, although such claimant may have claimed the property of the officer orally and not in conformity to the third section of said act.
2. It is not the failure of the claimant to give notice of this claim to the officer in the form required by the third section of said act that exempts the officer from liability to such claimant; it is the taking of an indemnification bond in conformity to the provisions of the first section of said act.

*Appeal from St. Louis Circuit Court.*

This was an action brought on the official bond of William B. Watson, as constable, against him and his securities, for wrongfully levying upon and converting certain property belonging to the plaintiff Goldsall. It appeared in evidence that one Kahn obtained a judgment before a justice of the peace against one Lewis Davis. An execution issued and was placed in the hands of Watson. Watson levied on certain personal property as the property of the defendant Davis.

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Goldsall verbally informed Watson that he claimed the property as his. Watson then required the plaintiff in the execution to execute a bond of indemnity, which was done, and the property sold and the proceeds applied to the execution. Goldsall made no claim in writing in conformity to the third section of the act of March 3, 1855. At the trial, the defendant offered the bond in evidence, and it was ruled out on the ground that it was immaterial, no written notice of claim to the property levied upon having been given in conformity to the third section of said act of March 3, 1855.

The court, at the instance of the defendant, gave the following instruction: "The jury are instructed that unless Meyer Goldsall set forth his claim to the property levied upon by defendant Watson in writing, verified by his affidavit, or that of his agent, describing the property claimed, and stating his interest therein, and whether said interest was in the whole or only part thereof, and stating also that he was in good faith the lawful owner of the interest claimed by him in said property, and that Louis Davis, the defendant in such execution, had or has no right or title directly or indirectly in the said property, or in the interest in said property claimed by said Meyer Goldsall, and that such claim so made by said Goldsall was not made in collusion with said Lewis Davis, defendant in said execution, for the purpose of vexing, hindering or delaying the said Natale Kahn, plaintiff in said execution, in obtaining his just rights, then the plaintiff can not recover in this suit, and the jury must find for the defendant."

The plaintiff took a nonsuit, with leave, &c.

*Cline & Jamison*, for appellant.

*Decker & Voorhis*, for respondents.

I. The instruction given was correct. If the officer disregards a claim legally made under the statute and fails to take a bond as required, then the claimant may have his remedy against the officer as heretofore, on his official bond or otherwise. If the officer demand and obtain the bond,

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then he is not liable in any manner, but the claimant must take his remedy against the obligors in the bond.

NAPTON, Judge, delivered the opinion of the court.

We do not consider it material whether the claim to property levied on under execution is made in conformity to the third section of the act of March 3, 1855, or not, if the officer chooses to treat it as a valid claim under the act, and demands and takes of the plaintiff in the execution a sufficient indemnification bond. The fifth section provides that where the officer takes such bond, with good and sufficient security, he shall not be liable to such claimant for any damage or injury sustained by such claimant in consequence of such levy or sale. Although the instruction, upon which the plaintiff was nonsuited, was erroneous, yet, as the same result would have followed from the fact that an indemnification bond was given, we shall affirm the judgment of the circuit court. The other judges concur.



ST. LOUIS, ALTON & CHICAGO RAILROAD COMPANY, Appellant,  
v. CASTELLO, Respondent.

1. The exemption from liability guaranteed to an officer levying an execution by the fifth section of the act of March 3, 1855, (Sess. Acts, 1855, p. 464,) where an indemnification bond has been given as required by that act, extends to an action of replevin brought against such officer.

*Appeal from St. Louis Court of Common Pleas.*

This was an action in the nature of an action of replevin to recover possession of personal property in possession of defendant. The defendant set up in his answer that, as sheriff of St. Louis county, he had levied upon the property in question under and by virtue of an execution issued under a judgment in the case of Farrell v. Chicago and Mississippi Railroad Company; that the plaintiff in this suit made claim

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thereto pursuant to the sheriff's and marshal's act of March 3, 1855; that the plaintiff, Farrell, thereupon executed an indemnification bond, which was approved by the sheriff. It appeared in evidence that the indemnification bond was given as set forth in the answer. The court gave the following instruction at the instance of the defendant: "If the property claimed in the suit No. 202, to the October term, 1857, of this court was property levied upon by the sheriff under the execution in the case of Farrell v. Chicago & Mississippi Railroad Company, and the plaintiff, previous to the bringing of said suit, made his claim in writing before the sheriff, verified by affidavit, claiming said property, and the said sheriff took from said Farrell an indemnification bond, then the plaintiff can not recover in this action."

*G. P. Strong*, for appellant.

I. The act of March 3, 1855, does not cut off or bar the right to replevy property out of the possession of the sheriff. (*Bradley v. Holloway*, 28 Mo. 150; see 28 Mo. 379.) It makes no difference that the claim made was accompanied by affidavit. That act was not intended in any way to abridge or affect the right of an owner of personal property to take it from the possession of the sheriff when wrongfully seized, and the making or the omission to make the affidavit and claim does not in any way affect the case.

*H. N. Hart*, for respondent.

I. This case is settled by the case of *Bradley v. Holloway*, 28 Mo. 150, in which it was held that the sheriff is not liable when the party claiming has made such claim pursuant to the statute, and bond with securities has been given in conformity to the act.

NAPTON, Judge, delivered the opinion of the court.

This case was determined by the court of common pleas upon the construction of the act of March 3, 1855, (Sess. Acts, 1855, p. 464,) settled by this court in *Bradley v. Hol-*

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then he is not liable in any manner, but the claimant must take his remedy against the obligors in the bond.

NAPTON, Judge, delivered the opinion of the court.

We do not consider it material whether the claim to property levied on under execution is made in conformity to the third section of the act of March 3, 1855, or not, if the officer chooses to treat it as a valid claim under the act, and demands and takes of the plaintiff in the execution a sufficient indemnification bond. The fifth section provides that where the officer takes such bond, with good and sufficient security, he shall not be liable to such claimant for any damage or injury sustained by such claimant in consequence of such levy or sale. Although the instruction, upon which the plaintiff was nonsuited, was erroneous, yet, as the same result would have followed from the fact that an indemnification bond was given, we shall affirm the judgment of the circuit court. The other judges concur.



ST. LOUIS, ALTON & CHICAGO RAILROAD COMPANY, Appellant,  
v. CASTELLO, Respondent.

1. The exemption from liability guaranteed to an officer levying an execution by the fifth section of the act of March 3, 1855, (Sess. Acts, 1855, p. 464,) where an indemnification bond has been given as required by that act, extends to an action of replevin brought against such officer.

*Appeal from St. Louis Court of Common Pleas.*

This was an action in the nature of an action of replevin to recover possession of personal property in possession of defendant. The defendant set up in his answer that, as sheriff of St. Louis county, he had levied upon the property in question under and by virtue of an execution issued under a judgment in the case of Farrell v. Chicago and Mississippi Railroad Company; that the plaintiff in this suit made claim

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thereto pursuant to the sheriff's and marshal's act of March 3, 1855; that the plaintiff, Farrell, thereupon executed an indemnification bond, which was approved by the sheriff. It appeared in evidence that the indemnification bond was given as set forth in the answer. The court gave the following instruction at the instance of the defendant: "If the property claimed in the suit No. 202, to the October term, 1857, of this court was property levied upon by the sheriff under the execution in the case of *Farrell v. Chicago & Mississippi Railroad Company*, and the plaintiff, previous to the bringing of said suit, made his claim in writing before the sheriff, verified by affidavit, claiming said property, and the said sheriff took from said Farrell an indemnification bond, then the plaintiff can not recover in this action."

*G. P. Strong*, for appellant.

I. The act of March 3, 1855, does not cut off or bar the right to replevy property out of the possession of the sheriff. (*Bradley v. Holloway*, 28 Mo. 150; see 28 Mo. 379.) It makes no difference that the claim made was accompanied by affidavit. That act was not intended in any way to abridge or affect the right of an owner of personal property to take it from the possession of the sheriff when wrongfully seized, and the making or the omission to make the affidavit and claim does not in any way affect the case.

*H. N. Hart*, for respondent.

I. This case is settled by the case of *Bradley v. Holloway*, 28 Mo. 150, in which it was held that the sheriff is not liable when the party claiming has made such claim pursuant to the statute, and bond with securities has been given in conformity to the act.

NAPTON, Judge, delivered the opinion of the court.

This case was determined by the court of common pleas upon the construction of the act of March 3, 1855, (Sess. Acts, 1855, p. 464,) settled by this court in *Bradley v. Hol-*

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loway, 28 Mo. 150. It is contended that the exemption from liability, secured by the act to the sheriff in certain contingencies, should be limited to actions of trespass, and that his liability to an action of replevin for the recovery of the specific property was intended to be left as it was before the passage of the act. In the case of *Bradley v. Holloway*, the action was replevin, and it was not thought that any distinction was designed to be made on account of the form of action. In fact, so far as the sheriff is concerned, it would be perfectly immaterial whether the suit is replevin or trespass, since the measure of damages in the latter case would be simply the value of the property. Vindictive damages could not be given against the officer acting in obedience to a writ and under the directions of the plaintiff in the execution. The act would therefore answer no useful purpose, if construed to permit actions of replevin.

The judgment is affirmed; Judge Ewing concurring.

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TAYLOR *et al.*, Respondents, v. WIMER, Appellant.

1. In order to make a sheriff responsible for a failure to levy an execution, it must be shown that he had knowledge of property owned by the execution debtor subject to execution, and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find the property.

*Appeal from St. Louis Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.

A. M. & S. H. Gardner, for appellant.

I. The court erred in finding that the attorney of plaintiffs directed defendant to levy the execution on goods and merchandise "in the store of Nelson Chamblin." It does not appear that Chamblin had any interest in the goods in the store pointed out. So also in finding that there was "sufficient" merchandise "belonging" to Chamblin to satisfy the execution. There was no evidence whatever as to the value

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of the goods ; and it was too slight to justify the finding that they belonged to Chamblin. The finding is inconsistent ; by finding that Chamblin was insolvent, the court negatived conclusively the allegation that plaintiffs lost their debt by defendant's neglect.

*Knox & Kellogg*, for respondents.

I. It was the duty of the officer either to levy the execution or give some good reason for not levying it. In this case defendant gave assurance to Mr. Dick that he would make the levy, but neglected to do so. The fact that there was an older execution in defendant's hands is no excuse for neglecting to levy as directed. The execution may have been fraudulent, and was so, as Mr. Dick testifies he had been informed. It does not appear but that the merchandise upon which defendant was directed to levy was sufficient to satisfy all the creditors of Chamblin.

EWING, Judge, delivered the opinion of the court.

This was an action against the sheriff of St. Louis county for failing to execute a writ of *ieri facias*, in which the plaintiffs claimed three hundred and sixty-five dollars and twenty-eight cents and interest, the amount of an execution against one Nelson Chamblin, which they allege was lost to them by reason of the failure of the defendant to levy said execution, and which the petitioner avers the defendant was requested to levy on the goods and effects of said Chamblin, which he neglected to do ; and that the same was delivered to his successor, who returned the execution *nulla bona*.

The answer denies that the plaintiffs ever requested the defendant to levy on any property of Chamblin, or that they ever designated any property of his on which he could make a levy ; or had knowledge of any property belonging to said Chamblin. It further alleges that there were older judgments and executions to which any money coming into his hands would have been applicable, and denies generally any failure or neglect of duty on his part. The cause was tried

by the court sitting as a jury, and a judgment rendered for plaintiffs for four hundred and seventy dollars and sixty-nine cents. The appellant filed a motion for review, which was overruled, and the only question for our determination is whether the evidence supports the finding of facts by the court below.

The evidence is that a witness of plaintiffs, F. A. Dick, Esq., their attorney, in the spring of 1854, told the defendant that Chamblin had a stock of goods in his store on the corner of Second and Market streets, and desired him to secure the debt by making a levy. Wimer replied he knew it himself and that it would be all right, and should be attended to. The witness did not go with the respondent to the place, nor offer to go, but was ready to do so, and witness' impression was that a levy would be made. At the time of this conversation the witness did not know of his own knowledge that there was any property at the place named belonging to the said Chamblin, or that he had property of any kind subject to levy under execution. Witness stated his impression was that the goods in the store were covered by a fraudulent execution of about four thousand dollars, though there were executions on older judgments in defendant's hands at the time; could not say that he ever saw Chamblin in possession of the store at the place named; thought he had seen him in the store a year or more before he brought the suit. He urged Maddox, defendant's successor, to levy on the same store, but he refused without a bond, which witness would not give. Stevens, a witness, said he knew the store referred to and saw Chamblin in it at different times in 1854. There was a good stock of goods in it, but did not know who was the owner. Several persons in the store did not know whether Chamblin was clerk, agent or principal; never saw Chamblin at the store after April, 1854. W. C. Jamison, witness for defendant, stated that he obtained a judgment against Chamblin, October 23, 1854, and an execution was in the hands of the sheriff in the spring of 1854, on which no money was made; made inquiries for prop-

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erty, but did not direct a levy, and did not know that anything could be made on the execution. The appellant then offered in evidence an execution in favor of Little & Olcott against Chamblin, on an older judgment, which was in the hands of the defendant as sheriff at the time the plaintiff's execution was, which was excluded and exceptions saved. This execution was for four thousand five hundred dollars, and dated April 28, 1854.

The finding of the court is as follows: That the plaintiffs were partners; that said John M. Wimer had in his possession as sheriff an execution in favor of said plaintiffs against Nelson Chamblin, in the spring and summer of the year 1854; that the attorney of the plaintiff directed said Wimer to levy said execution on the goods and merchandise in the store of the said Nelson Chamblin, on the corner of Second and Market streets, in the city of St. Louis; that when said order was given there was sufficient merchandise in said store belonging to said Chamblin to satisfy said execution; that said Wimer neglected to levy said execution, and that in consequence of said neglect plaintiffs have lost their debt against said Chamblin, who is insolvent. Upon which finding a judgment was rendered.

This suit is for alleged breach of duty in failing to levy the execution according to law, and if there was any failure of duty it consisted in not levying the writ on the property of the respondents. If they had property when the execution was placed in the hands of the sheriff, which he could have found by the exercise of reasonable diligence, it was his duty to levy it, and failing in this, he became liable. But his liability must depend upon the establishment of the fact, by positive or circumstantial evidence, that he had knowledge of property owned by the execution debtor, subject to execution, and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find the property. (1 J. J. Marshall, 553.) Possession of personal property being *prima facie* evidence of ownership, wherever it is shown that the sheriff had know-

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ledge that the defendant in the execution was possessed of personal property and he fails to levy upon it, the burden of proof falls upon him to show that the property was not subject to execution. We think the evidence does not support the finding of the court, as to the facts, namely, that plaintiffs directed the defendant to levy the execution on the goods *in the store of Chamblin*, and that there was *sufficient* merchandise in the store *belonging* to him to satisfy the execution. There was no evidence as to whom the store belonged, or even who had it in possession. Chamblin was seen with others in the store, but whether he or some one of the others owned it or had the possession does not appear. There is a like want of evidence as to the ownership of the goods; no witness testifies to this point. Mr. Dick says he did not know whether Chamblin had any property subject to execution or not, or that there was any property at the store belonging to him. As to the *quantity* or *value* of goods there is no evidence whatever.

The court also finds that Chamblin was *insolvent*. If this was so, then the same evidence that established the fact of insolvency also established the fact that Chamblin had no property subject to plaintiffs' execution, and there was nothing upon which to base the finding that the respondents lost their debt by the neglect of the appellant; for the evidence of Chamblin's insolvency related to the time at which the respondent's execution was in the hands of appellant.

Judgment reversed and the cause remanded; Judge Scott concurring. Judge Napton absent.

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WALKER, Respondent, v. ENGLER, Appellant.

1. Parol evidence is inadmissible to incorporate with a written instrument an oral agreement made contemporaneously with such instrument.
2. Where it is stipulated in a lease that in case any of the covenants are broken by the lessee, "the term shall become null and void at the option of the lessor," the term does not become ended absolutely by a breach of a

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covenant; it is only voidable at the option of the lessor; he must do some act declaring or claiming a forfeiture.

3. So, where it was stipulated that the lessee would pay double rent for all the time the lessor should be kept out of possession after the expiration of the term by forfeiture, *held*, the double rent reserved was not a penalty, but estimated or liquidated damages.
4. Acceptance of rent by a lessor, after the lessee had committed a breach of his covenants, such as would authorize the lessor to declare a forfeiture, would not be a waiver of the forfeiture if the lessor was ignorant of such breach at the time of the acceptance of rent.

*Appeal from St. Louis Land Court.*

The facts sufficiently appear in the opinion of the court.

*Knox & Kellogg*, for appellant.

I. The court erred in striking out a portion of the answer in this case. The first instruction given, on motion of the plaintiff, is erroneous. The lease was forfeited only from the time the lessor declared it forfeited. The stipulation with respect to double rent was a penalty, and not liquidated damages. (Sedg. on Dam. 398, 421.) If Walker knew of the alterations when they were being made, and assented thereto, he should not be permitted to claim a forfeiture. Defendant's instructions should have been given.

*Todd and Garesché*, for respondent.

I. The matter stricken out was not a defence. It was properly stricken out. (8 Mo. 161; 17 Mo. 577; 2 Story on Contr. § 669.) To make an acceptance of rent by the lessor a waiver of a forfeiture, the lessor must know of the wrongful act. (Taylor on L. & T. § 497; 2 Platt on Leases, 468, 473.) The court committed no error in giving or refusing instructions. The verdict was only for the double rent from the time of forfeiture to the time of giving up possession. There was no evidence of Walker's assenting to the alterations.

EWING, Judge, delivered the opinion of the court.

This was an action for the possession of certain premises leased by the plaintiff to the defendant in the city of St.

Louis, alleged to be unlawfully detained, and for double rent from the date of the unlawful detention and for damages.

One of the covenants on the lease is that the lessee would not make any alterations in the premises, which the petition alleges was violated, and by reason thereof the term was avoided by the plaintiff and possession demanded. The answer denies that such alterations were made as would entitle the plaintiff to enforce a forfeiture, and alleges that when the lease was made, it was expressly agreed that any such alterations as should not injure said tenement, and which might be again so changed as to return the tenement to the condition it was in when leased, should not be deemed a violation of the covenant against alterations. This part of the answer was, on motion of the plaintiff, stricken out, and, we think, properly. It was an alleged parol agreement, contemporaneous with the execution of the lease, varying its terms, and so qualifying the covenant with regard to alterations as to make it entirely different.

Several points arise upon the instructions given and refused, which will be noticed in their order. The plaintiff maintains that, if the covenant of the lessee respecting alterations was violated, he was entitled to the possession of the premises from that time, and to damages for withholding the possession at the rate of one hundred and fifty dollars per month from the time of making such alterations to the time of the delivery of the possession, and an instruction embracing this proposition was given for the plaintiff. The lease says that in case any of the covenants are broken the term shall become null and void at the option of the lessor or his representatives, and that he may enter into and take full possession of the premises; also that the lessee will pay double rent for all the time the lessor or his representatives are kept out of possession after the expiration of the term, either by limitation or forfeiture. The said double rent to be paid daily. The rent reserved is seventy-five dollars per month, payable the first of each month.

Upon the first point involved in the instruction it is insisted

by the defendant's counsel that the charge of the court is erroneous in saying that the lease was forfeited from the time the alterations were made; whereas no forfeiture could be incurred until the lessor declared it to be forfeited; and upon the second point, that the stipulations in the lease as to double rent is a penalty and not liquidated damages. It is urged for the plaintiff, in opposition to this view, that the rule laid down in this instruction is correct, and that it results from the doctrine of waiver; that by this doctrine the acceptance of rent accrued *after* the alterations were made, with a knowledge thereof, is a waiver of the right of forfeiture, and that unless damages ran from this time the landlord would lose for the interval claimed, and in this way a wrong-doer would profit by his wrongful act.

This position, we think, is not tenable. By the terms of the lease the term is not void by reason of a violation of the covenants *ipso facto*, but is *voidable* only at the option of the lessor. He may or may not insist upon a forfeiture, and until he exercises the option reserved to declare or claim a forfeiture, the term continues. It is by his own act and not that of the lessor that the lease is terminated; and it is of course by his own omission to insist upon a forfeiture immediately upon the violation of the covenant, or as soon as he has knowledge of it, that he is placed in a situation in which he may waive a forfeiture by accepting rent, and yet not be allowed to claim damages or double rent from the time the covenant is broken; or, as in the case before us, from the time the alleged alterations were made. So that as a legal proposition, we think the instruction is erroneous. Nevertheless, we can not see how the defendant could have been injured by it. The rent was paid up to the 1st of March, 1856, from which time to some time in October, 1857, the defendant continued in possession of the property, when it was delivered to the plaintiff. If damages are allowed from the time notice was given and a forfeiture claimed by the plaintiff from the 5th of March, 1856, to the time possession was surrendered, they would amount, for nineteen months, to two thousand eight hundred

and fifty dollars; but if only from 1st April, as claimed in the petition, they would not exceed the sum for which judgment was given.

The second point is not well taken. We are of opinion the double rent reserved is not a penalty as contradistinguished from liquidated damages. The lease stipulates for seventy-five dollars per month, payable monthly, and it is covenanted that the lessee will pay double rent for all the time the said Walker or his representatives are kept out of the possession of the premises after the expiration of the term either by limitation or forfeiture—the double rent to be paid daily. It is difficult if not impracticable to lay down any general principles by which to determine, in all cases, whether the sum mentioned in the instrument is to be considered as a penalty or liquidated damages. Neither an express agreement that it is to be regarded as liquidated damages, nor the fact that the act or acts for the performance or abstaining from which the covenant is given is or is not measurable by any exact pecuniary standard, is always conclusive to show the true character of the sum agreed to be paid. But the nature and terms of the contract in this case relieve it of any difficulty of interpretation, or of the necessity of testing it by any general rule of doubtful applicability. This case is distinguishable from that class of cases where a sum of money in gross is agreed to be paid for the nonperformance of a covenant. Here is a covenant, the alleged violation of which has enabled the lessor to avoid the term and terminate the lease; and after it is avoided, the lessee continues in possession under an express agreement that if he does, he will pay double rent. When the lease was terminated by the forfeiture, the defendant could have avoided the double rent by surrendering the premises, but instead he continues to withhold the possession, and in making his election to retain them insists he shall do so on his own terms. In thus voluntarily retaining the property, it is to be presumed that he considered the use of it of greater value to him than the double rent. We think it is clear, from the

nature and terms of the agreement, that the parties have estimated and liquidated the damages, and that they intended the sum mentioned should be regarded as a compensation and not as a penalty.

The second instruction given for the plaintiff declares the law correctly. The acceptance of rent by the plaintiff accrued before the alterations were made would not be a waiver of his right to a forfeiture, nor would acceptance of rent accrued after the alterations were made unless it be proved that the plaintiff knew of their having been made when he received the rent; acts of the lessor in ignorance of a forfeiture do not operate as a waiver of it, because there is in such case no affirmance of the tenancy, nor a recognition of the relation of landlord and tenant.

The sixth instruction asked by the defendant was not warranted by any evidence in the cause; for when the plaintiff was applied to for permission to make the alterations, it was positively refused. The seventh instruction is substantially, that if, when the plaintiff leased the premises, he knew of the business for which they were to be used, and knew that such alterations as were actually made must be made for such business, and assented to the alterations, that the respondent can not take a forfeiture of the lease. This instruction was not warranted by any evidence, and does away entirely with the express covenant of the lease on the subject of alterations, and was therefore obviously improper.

The defendant offered to prove that when the building was insured he paid the respondent the extra insurance on the building arising from the business to be carried on by him. This evidence was excluded and rightly so; it was a question foreign to the issues to be tried; was a matter not mentioned in the lease, and had been very properly stricken from the answer.

Judgment affirmed; the other judges concurring.

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Haskell v. Champion.

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HASKELL *et al.*, Plaintiffs in Error, v. CHAMPION *et al.*,  
Defendants in Error.

1. One B. F. C. C., member of a partnership firm doing business under the style of "C. & Co.," executed a promissory note in his own name, B. F. C. C., and procured the signatures of persons not members of said firm as endorsers for his accommodation; before procuring the sale of the note, and without the knowledge of said endorsers, he added to the signature the words "& Co."—thus making it "B. F. C. C. & Co." The same was then sold for his accommodation. *Held*, in a suit by the purchaser against the maker and endorsers, that the endorsers were discharged by the alteration.

*Error to St. Louis Circuit Court.*

This was a suit against Champion as maker and the other defendants as endorsers of a negotiable promissory note. The note was signed "B. F. C. Champion & Co.," and the signature proved to be in the handwriting of Champion. All the other signatures were proved to be genuine, and due demand, refusal of payment, protest and notice were proved; also the copartnership of plaintiffs, and of defendants C. D. and J. T. Sullivan. The defence rested upon the following facts, which were proved: B. F. C. Champion executed the note and obtained the endorsements of the Sullivans and Papin for his accommodation. He then delivered the note to Myerson to be sold by him. Myerson endorsed and sold the note to plaintiffs. When the note was first handed to Myerson, (after the endorsements of the Sullivans and Papin,) it was executed in the name of "B. F. C. Champion." Champion was a member of a firm styled "Champion & Co." Plaintiffs, when they were first asked by Myerson to buy the note, told him they would prefer to have the firm of Champion & Co. as makers. Myerson then took the note back to Champion, who, without consulting the endorsers, Sullivan and Papin, added the words "& Co." to his individual signature. The note thus altered was bought by the plaintiffs. It was proved that there never was any such firm as "B. F.

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C. Champion & Co.”—the style of the only firm of which Champion was a member being “Champion & Co.”

Upon this proof, plaintiffs asked the following instructions: “1. If the note in question was originally signed by B. F. C. Champion as maker and the words “& Co.” were added subsequent to the endorsement thereof and without the consent of the endorser, yet the alteration does not avoid the note, if said alteration was made before a transfer thereof for value. 2. If notice of the dishonor of the note in question was duly given to the endorser, then they stand charged as endorsers although the above mentioned alteration of the note may have been made as above stated, and although the notices of protest may have described the note as made by ‘B. F. C. Champion & Co.’ 3. The alteration above spoken of was wholly immaterial, if there was in fact no such firm as ‘B. F. C. Champion & Co.’ The addition of the words ‘& Co.’ did not change the relations of any parties to the note.”

All of which the court refused. The court then rendered judgment for the plaintiffs against defendants Champion and Myerson, and against plaintiffs and for defendants, the Sullivans and Papin.

*Krum & Harding*, for plaintiffs in error.

I. There being no such firm as “B. F. Champion & Co.,” the addition of the words “& Co.” to the name of B. F. C. Champion did not in any way vary the contract, or affect the rights, liabilities or relations of the parties. It may be treated as a flourish, meaning nothing. (See Chitty on Bills, 184; 15 Pick. 239; 18 Johns. 391; 10 Conn. 192.) The alteration was made before it was issued. It had no vitality until plaintiffs bought it. (5 B. & Ald. 674; Byles on Bills, 390.) In that case the maker had a right to make any alteration not affecting the relations of the parties before issuing it. (Byles on Bills, 390.) The case of Trigg v. Taylor, 27 Mo. 245, was a case of fraudulent alteration, and had no reference to circumstances like those presented in this case. Whether the alteration was material or not was a question

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for the court. (4 How., Miss., 231; 7 S. & R. 508; 2 N. H. 543.) The instructions asked should have been given.

*A. J. P. Garesché* and *A. M. & S. H. Gardner*, for defendants in error.

I. The change was material. (1 Greenl. Ev. § 568; *Trigg v. Taylor*, 27 Mo. 247.)

SCOTT, Judge, delivered the opinion of the court.

The law, in dealing with the subject of the alteration of written instruments, looks further than to the materiality or immateriality of the alteration. Aware of the danger of countenancing the most trifling change, it has not permitted those entrusted with such instruments to alter them and afterwards defend their conduct by alleging the immateriality of the alteration. There is a motive to such conduct, and if an alteration of an instrument is immaterial, and believed to be so, there can be no inducement to the act. Every man's sense of justice and propriety must teach him that it is wrong to alter in any way an instrument made by another which is to bind him. As the nature and purposes of contracts require that they should pass to the hands of those who are interested in altering them to the prejudice of those who execute them, and as the facilities for making alterations are numerous and the difficulty of proving them is great, all means should be employed to impress on the minds of those who are in the possession of such paper a sense of its inviolability.

Greenleaf, speaking of instruments which are made void by reason of their alteration, says the grounds of this doctrine are two-fold. The first is that of public policy, to prevent fraud, by not permitting a man to take the chance of committing a fraud without running any risk of losing by the event when it is detected. The other is to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned. (Sec. 565; *Mudlin v. Platte County*, 8 Mo. 238; 19 Penn. State Rep. 119.)

We do not consider the alteration was a matter of indiffer-

ence. It certainly affected the payee and endorsers. Had they paid the note, the alteration would have confused and embarrassed them in obtaining indemnity from the maker. Although there was no firm whose style was B. F. C. Champion & Co., yet if a note for a debt due by Champion & Co. had been executed in the style of B. F. C. Champion & Co., it does not follow that Champion & Co. would not have been liable. Partners, by misnaming the style of their partnership, can no more obtain an advantage than individuals by misnaming themselves. They may embarrass their creditors in the pursuit of their remedies by such a course, but they can not expect thereby to escape the payment of their liabilities. The note, as originally executed, imported that it was for a debt of B. F. C. Champion. If afterwards it is altered to make it a debt due by a firm, how are the payee and endorsers to know how to sue upon it? Will they sue the original maker or the partners? Will the endorsers, other than the payee, know whether or not it was for a partnership debt? The individual note of a member of a firm may be a preferable security to a note of the firm. This is obvious when we regard the law of partnerships as it is administered under the rules of equity, rules to which all partnerships are subject in the adjustment of demands against them in case of insolvency. To put a note in a condition that long and expensive litigation will be necessary to realize its proceeds, is a great diminution of its value.

Although Champion, as the maker of the note, had a right to make any alterations he pleased before he uttered it, yet it can not be maintained that the maker of a promissory note, after he has signed it and procured the endorsement of the payee and others as endorsers, can substitute the name of another maker without the consent of the payee and endorsers. This is too plain to need any argument or illustration.

Judgment affirmed; Judge Ewing concurs. Judge Napton absent.

## DENNY, Respondent, v. ECKELKAMP, Appellant.

1. A party may give jurisdiction to a justice of the peace by a voluntary renunciation of a part of his demand. It matters not in what way the reduction of the demand is made, so the amount claimed is within the jurisdiction of the justice.

*Appeal from St. Louis Law Commissioner's Court.*

This was an action commenced before a justice of the peace to recover the balance of an account. The plaintiff claimed for "services in putting up hay" in one Hickman's meadow. There were two credits of cash in the account, one of thirty dollars and the other of five dollars—reducing the amount to ninety-seven dollars. There was this further credit in the account as presented to the justice: "By groceries, \$7"—reducing the amount claimed to ninety dollars. The evidence showed that the plaintiff and defendant cut and stacked the hay as partners, and that afterwards the defendant bought the plaintiff's interest, engaging to pay him seventy-five dollars and pay all the expenses of the cutting. In the account presented the seventy-five dollars appeared as an item for services in putting up the hay, and the other debit items were for various expenses of the cutting. Evidence was adduced by the defendant with a view to show that the farm and the hay belonged to one Hickman; that the hay was cut down by plaintiff and defendant without authority, and that defendant afterwards paid Hickman for the hay.

Various instructions asked by the defendant were refused.

*Coleman*, for appellant.

I. The justice had no jurisdiction. A party may give a voluntary credit. (17 Mo. 258.) This is not a voluntary credit, or renunciation. It is an attempt to give jurisdiction by crediting on plaintiff's account a part of the defendant's account against him. This can not be allowed. (20 Mo. 497.) The plaintiff claims in his account seventy-five

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Denny v. Eckelkamp.

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dollars for services rendered by him in cutting hay. The account contains no item for hay, or any interest in hay sold by him to defendant. There is not merely a variance but a failure of proof. (19 Mo. 30.) The agreement as proved is within the statute of frauds. No part of the hay was delivered, nor any thing given in earnest, nor any note or memorandum made thereof. The defendant bought the hay of the true owner. The court erred in refusing the declarations of law offered.

*S. H. Gardner*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

So far as the question of jurisdiction is concerned, we can not distinguish this case from that of *Hempler v. Schneider*, 17 Mo. 258. It is impossible for the court trying a case of this character to know what motive induces the abatement of the demand; it is sufficient that the plaintiff has reduced it within the limits prescribed for the jurisdiction of a justice.

As to the form in which the plaintiff's account was made out, which was for "services in putting up hay" instead of for the interest sold by the plaintiff to the defendant in a crop of hay put up at their joint expense, we do not think the matter very material. Nor had the statute of frauds any thing to do with the case, because the hay was unquestionably delivered, and there had also been payments upon the contract between plaintiff and defendant.

As to the title to the meadow on which the hay was cut, we do not see that it could have any influence upon the question raised between plaintiff and defendant. It does not appear that they were trespassers, and the fact that the defendant paid Hickman is not conclusive that Hickman's claim was any better than plaintiff's.

The other judges concurring, the judgment is affirmed.

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Willard v. Moies.—Ivory v. Carlin.

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WILLARD, Respondent, v. MOIES *et al.*, Appellants.

1. No written assignment of a promissory note is necessary in order to entitle the holder to sue thereon in his own name.

*Appeal from St. Louis Circuit Court.*

*Smith & Sedgwick*, for appellants.

*P. C. Mauro*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note. This suit was in the name of the holder of the note, Lucius A. Willard. The defence was that the plaintiff was not the legal owner or holder of the note sued upon, and that it was never assigned to the plaintiff.

In the case of *Boeka v. Nuella*, 28 Mo. 180, it was held that no written assignment was necessary in order to enable the holder of a promissory note to sue thereon in his own name. The owner is *prima facie* the equitable owner, and under the statute the real party in interest may bring the action in his own name. This view of the subject makes it unnecessary to look into the deposition proving the assignment.

The other judges concurring, the judgment is affirmed, with ten per cent. damages.

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IVORY, Respondent, v. CARLIN *et al.*, Appellants.

1. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take the same by demurrer or answer.
2. The assignee of a non-negotiable note can maintain no action against the assignor unless he has first used due diligence to recovery of the maker, or unless such maker is a nonresident or insolvent. (R. C. 1855, p. 323.)

*Appeal from St. Louis Circuit Court.*

*Rankin*, for appellants.

*A. J. P. Garesché*, for respondent.

I. The petition, though awkwardly worded, was sufficient. (See 23 Mo. 254.) The motion in arrest was properly overruled. It is doubtful if such a motion now exists. (3 Abb. P. R. 428; 8 How. Pr. R. 160; 3 Seld. 576.) The verdict cured the defect, if any. The objection should have been made at the trial.

EWING, Judge, delivered the opinion of the court.

This was an action on a promissory note for six hundred dollars by the respondent as endorsee, of which Carlin was the maker, payable to his own order, and English the endorser. There was a trial by the court without a jury and judgment for the respondent. A motion in arrest of judgment being overruled, the cause is brought here by appeal.

The only question is as to the sufficiency of the petition, which alleges that the defendant Carlin by his promissory note, herewith filed, dated St. Louis, June 4, 1857, promised, for value received, to pay to his own order, four months after the date thereof, the sum of six hundred dollars; that subsequently defendant Carlin assigned by endorsement and delivered said note to the defendant Ezra O. English; and that said English subsequently assigned by endorsement and delivered said note to plaintiff. The petition then alleges protest of the note, demand of the maker, and notice to the endorsers. The note does not appear in the transcript, and the note, as set out in the petition, is not a negotiable instrument in the sense of the statute concerning bills of exchange (sec. 15), on which a suit could be maintained against an endorser before exhausting the remedy against the maker, and on which damages are allowed; but is an assignable note, the payment of which can be enforced against the assignor only upon failure of the maker in the cases specified

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Molony v. Boernstein.

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by the statute. (R. C. tit. Bonds and Notes, § 6, p. 323.) The defect in the petition was not waived by a failure to demur or answer, because the facts stated were insufficient to constitute a cause of action. (R. C. p. 1231, § 10; Weaver v. Beard, 21 Mo. 156. See also Andrews v. Lynch, 27 Mo. 169.)

Judgment reversed and cause remanded; Judge Scott concurring. Judge Napton absent.



MOLONY *et al.*, Respondents, v. BOERNSTEIN *et al.*, Appellants.

1. Ivory v. Carlin, ante, p. 143, affirmed.

*Appeal from St. Louis Circuit Court.*

A. M. & S. H. Gardner, for appellants.

A. J. P. Garesché, for respondent.

EWING, Judge, delivered the opinion of the court.

This was a suit on a promissory note, non-negotiable, made by the defendant Boernstein, for five hundred dollars, and payable to the defendant Jacoby six months after date; it being dated 9th May, 1857. The petition alleges an assignment and delivery of the note by Jacoby to the plaintiffs, protest, presentment for payment, and notice to the defendants.

The answer denies the endorsement and delivery of the note to plaintiffs; that the note was protested, or that notice thereof was given to the defendants. A motion was filed by the defendants with an affidavit for a continuance, which was overruled; whereupon the cause was tried by the court and judgment given for plaintiffs for five hundred and thirty-five dollars and fifteen cents. This case is like that of Ivory v.

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Morrison v. Philliber.

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Carlin et al., decided at this term, and for the reasons given in the opinion in that case the judgment is reversed and the cause remanded; Judge Scott concurring. Judge Napton absent.

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MORRISON, Defendant in Error, v. PHILLIBER, Plaintiff in Error.

1. Inadequacy of consideration for the conveyance of land is not, of itself, a sufficient ground of relief, unless it is so gross as to raise a presumption of fraud.
2. Where a person, owning real estate of the value of three thousand five hundred dollars, but who had no knowledge of its value, was illiterate, being able neither to read nor write, was induced by a person, in whom she had confidence and who acted in a double capacity as agent for both parties, to dispose of said real estate to another for seventy-five dollars; *held*, that the transaction was stamped with fraud, and the facts would warrant a decree setting aside the conveyance on the ground of fraud.

*Error to St. Louis Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*D. C. Woods*, for plaintiff in error, cited the following authorities: 12 Mo. 157; 14 Mo. 580; 17 Mo. 209, 228; 19 Mo. 423; 23 Mo. 188, 579; 24 Mo. 167; 19 Ves. 131; 11 Wheat. 125; 2 Sto. Eq. § 697; 3 Ves. 368; 11 Ves. 535; 2 Jac. & Walk. 391; Story on Ag. 14.

*B. A. Hill*, for defendants in error.

I. The inadequacy of consideration is such in this case as to shock the moral sense of any man, and amount in itself to conclusive and decisive evidence of fraud. (Sto. Eq. § 246; 9 Ves. 246; 10 Ves. 219; 2 Madd. Ch. 556; Jacob, 280; 16 Ves. 512; 1 Brown's Ch. 9; 2 Johns. Ch. 1, 23; 14 Johns. 527.) There are other circumstances in the case; Julie's ignorance; the peculiar relations between her and Mulholland, servant and master. In such case, the gross inadequacy of price must necessarily furnish the most con-

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clusive presumption of fraud. (2 Ves. sr., 516; 14 Ves. 273.) Mulholland was the agent for both Julie and the buyer. (2 Camp. 203; 5 B. & Ald. 333; Sto. Eq. § 210; White & Tudor's Lea. Ca. in Eq. 129, 141.)

EWING, Judge, delivered the opinion of the court.

The defendant in error, Julie Morrison, filed her bill to set aside a deed executed by her to Philliber for certain real estate in the city of St. Louis, which she alleges was procured by fraud. There was a decree accordingly, and the title to the property vested in the plaintiff. The defendant filed his motion for a new trial, which being overruled, he brings the cause to this court by writ of error. The cause was tried under the practice act of 1849, and there was a finding of facts by the court. And the question for our consideration is, whether the facts as found were warranted by the evidence, and, if so, authorized the conclusion of law and the judgment of the court thereon.

It was admitted by the parties and the court found that Moses Yeina married Julie Morrison on the 1st January, 1858, and that the lot in question, on the corner of Green and Fifth streets, was worth the sum of five thousand dollars on the 13th March, 1850; that Henry T. Baccus was the agent of James K. Philliber at the time of procuring of said deed from Julie Morrison to Philliber on the 13th March, 1850; and from the evidence in the cause the court found that said Julie, on the 11th March, 1837, was an infant of the age of fourteen years; that said Julie, on the 13th March, 1850, was a widow, living in the state of Michigan, where she had lived ever since she left St. Louis, which was about the year 1837, except a year or so that she lived at Fort Wayne, Indiana; that William Morrison, her first husband, was then dead; that at the time of the execution of said deed by Julie to Philliber of the 13th March, 1850, one Samuel Mulholland acted as the agent of said Julie for the sale of her interest in said premises, described in deed of 13th March, 1850, to Philliber, and at the same time acted as the agent of said

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Philliber in making the purchase of said premises—the said Mulholland having been employed by said Baccus, who was the agent of defendant; that said Julia had been a servant for said Mulholland in his family before the said time, and was greatly under his influence and control; that Mulholland received from defendant's agent, Baccus, on behalf of the defendant, the sum of twenty-five dollars for procuring the said Julie to make the said deed to defendant, and paid over to said Julie as the consideration of said deed, the sum of seventy-five dollars; that the said Julie was ignorant of the value of said lot of land; had no correct knowledge thereof; could not read or write, and had lived near said Mulholland's place in Michigan from the time she was sixteen years old (except a short time at Fort Wayne) until the year 1850; that at the time of the negotiation for the execution of said deed, Mulholland, acting as the agent for both parties, represented to said Julie that the premises might be sold for taxes and that would embarrass the title, and did not disclose to her the value of her interest in said lot before the execution of said deed of March, 1850; that said deed was procured by the agents of defendant from said Julie, and she executed the same for a grossly inadequate consideration. Upon these facts the deed was declared void and a decree rendered; reserves truly the title to the property in the plaintiff, and that she pay into court the sum paid her for the execution of the deed.

After a careful examination of the evidence we are satisfied it fully sustains the finding of the court. Of the gross inadequacy of the consideration there can be no question, and whether it is so excessive as of itself, or in connection with other circumstances proved, to entitle the plaintiff to the relief sought, is the only other question to be considered. No precise rule has established what the disparity must be between the price paid and the value of the thing bought in order to invalidate a contract on this ground; but courts of justice are left to apply the principles of equity to each case according to its particular circumstances. Where the relief

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asked consists in rescinding or setting aside an executed contract, it is said that the inequality of the price to be sufficient for this purpose must be so excessive as to be demonstrative of fraud. Although mere inadequacy of consideration is not deemed a sufficient ground of relief of itself, it may be so gross as to amount to conclusive evidence of fraud. But where there are ingredients in the case of a suspicious nature or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud. (1 Story Eq. § 211.)

What are the facts on this point? The value of the property in question is admitted by the parties to have been, at the time of the transaction in 1850, five thousand dollars; the interest of the plaintiff in the property was eleven-sixteenths, and the price paid by Philliber was seventy-five dollars. Her interest then being worth some three thousand five hundred dollars, she received for it about one forty-fifth part of its value.

If we could suppose cases of greater inadequacy of consideration, it would not be easy to imagine one which would be more revolting to conscience or furnish a more conclusive presumption of fraud and imposition. Lord Thurlow, in *Gwyne v. Heaton*, 1 Broc. C. 9, said, that to set aside a conveyance there must be an inequality so gross and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. In *Butler v. Haskell*, 4 Dess., 697, Judge Desaussure, after a review of the English and American cases on the subject, says, he considers "the result of the great body of the cases seems to be, that, wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong and, in general, a conclusive presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this

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violent presumption by the clearest evidence of the fairness of his conduct ; and the relief is given by the court either by refusing to enforce the contract, or by setting it aside altogether, according to the circumstances of the case."

This case appears to come clearly within that degree of gross inadequacy which, in the decided cases that have been examined, furnished a presumption of fraud and vitiated the contract.

There are other circumstances which, with the smallness of price, must be conclusive, and fully sustain the decree of the circuit court. It was found by the court, and we think upon sufficient evidence, that Mulholland was the agent of both the contracting parties. He was acting in conjunction with Baccus for Philliber, the defendant, and was to receive a compensation from him for his services in procuring the conveyances ; and the amount of this compensation, as the evidence shows, depended in some measure upon the price for which he could purchase the property. So that he was not only the agent for both parties in a transaction in which their interests were in conflict, but had an interest in the matter adverse to the plaintiff. It further appears that the plaintiff was ignorant and illiterate ; could neither read nor write ; had no knowledge of the value of the property, and that this was not disclosed to her before the sale ; that her estimate of its value was evidently influenced by the agent's representations respecting tax sales, and that the relation that formerly existed between them and the confidence it inspired induced on her part an unsuspecting acquiescence in his suggestions and advice in the transaction.

Judgment affirmed ; the other judges concurring.

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DILWORTH, Appellant, v. MCKELVY, Respondent.

1. Where, in an action for the possession of personal property, under the seventh article of the practice act (R. C. 1855, p. 1242), the plaintiff obtains possession of the property upon giving bond, and fails to prosecute the

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action with effect, and it appears that the defendant has only a special interest in the property *as against the plaintiff*—for example, a lien thereon for money due from the plaintiff to himself, or a mere claim to possession for a limited period; in such case judgment should not be rendered in favor of the defendant for the return of the property or the payment of the entire value of the property, but the value of the interest of the defendant in the property should be assessed, and judgment should be rendered in favor of the defendant for the value so assessed, or the return of the property until such value be paid, at the option of the defendant.

2. Where the defendant has only a special interest and the plaintiff is a stranger to the title, the entire value may be recovered by the defendant as special owner, and he will be answerable over to the general owner to the extent of the latter's interest; in such case, the general value of the property would be assessed without regard to the value of the special interest. The judgment in each case must be modified by the circumstances, so that the merits of the controversy may, if possible, be settled in one action.
3. Where goods are shipped on board a barge to a port on the western waters, and the barge on the voyage is accidentally grounded and in danger of being lost by the perils of navigation together with the goods on board, and it becomes necessary, for the purpose of saving the barge and lumber from destruction, to unload and reload the same, and the master does so load and reload and take care of the barge and goods when so unloaded, it is a case for contribution, of general average.

*Appeal from St. Louis Court of Common Pleas.*

The following are the instructions given by the court, of its own motion, and on which the case was submitted to the jury: "1. If the jury believe from the evidence that the lumber sued for was with the other lumber shipped under the bill of lading read in evidence, and that, on the voyage from Pittsburgh to St. Louis, on the Ohio river, the said barge No. 17 was accidentally grounded and in danger of being lost by the perils of navigation, together with the lumber on board, and that, for the purpose of saving the barge and lumber from destruction, it was necessary to unload and reload said lumber, and defendant, as master of the barge, did unload and reload the lumber, and take care of the barge and lumber whilst so unloaded, the owner of the lumber became liable for a part of the costs and expenses incurred by the defendant, as follows: that is, the barge, the freight list of the same, and the lumber, deducting the freight, were each to contribute to make up said expenses and costs ac-

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ording to their value, and for the amount chargeable to the lumber the defendant, as master of the barge, had a right to hold possession of the same until the amount was paid or secured to him. 2. If therefore the jury shall find that the defendant had a right to hold the lumber according to the principles above stated, and did withhold the same from plaintiff on that account and no other, the jury ought to find for the defendant. 3. If, however, the jury shall find that the defendant had no such right, or did not withhold the lumber from the plaintiff on that ground, or if the defendant withheld the lumber known to him to be larger than the sum due to him, the jury will find for the plaintiff."

The other facts of the case sufficiently appear in the opinion of the court.

*J. K. Knight*, for appellant.

I. The court erred in refusing the instructions asked by plaintiff. (3 Kent, Com. 232; Story on Bailments, § 583; 2 Phillips on Ins. 1269, 1271; Stevens & Ben. 60, 101, 137, 280; 1 Conkl. Adm. 255, 221; 10 How. 270, 303; 1 Holts. 192; 11 S. & R. 61; 3 Stew. & Port. 136; 4 id. 383; Angell on Carr. 169; 1 Louis. 354; 6 How. 382; 28 Mo. 360; 23 Barb. 240; 8 Wend. 445; 21 Wend. 300; 5 Ham. 306; 3 M. & S. 483; 1 La. Ann. 57; 1 Hagg. 236; 1 Curt. 378; 10 Pet. 108; 2 Cranch, 240; 2 Peters, Admr. 295.) The instructions given by the court did not state the law correctly; they were calculated to mislead. The first instruction assumes that accidental grounding is one of the excepted perils. This is erroneous. (10 How. 270; Benecke on Average, 138, 215; 1 Conkl. Admr. 221, 230.) It next assumes that the expenses of the master and crew, in unloading and reloading the lumber to avoid the perils of navigation, could become a charge on the same by way of lien for salvage service without any actual or constructive abandonment, distress or shipwreck. It leaves it to be inferred that the barge, the freight list of the barge, and the lumber, deducting the freight, were the only subjects to contribute to

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make up the expenses. If it is a case of general average the steamboat, the barges in tow, and all their freight and cargo must contribute. (3 Kent, 232; 1 Louis. 354; 1 Sto. C. C. 463; 2 Sumn. 389.) The court erred in assessing the damages after a general verdict by the jury without notice to the plaintiff and on the mere motion of defendant. (1 Ld. Ray, 324; 5 Ohio, 227; 9 Ohio, 131; 21 Wend. 90; 28 Mo. 360.) The court erred in assessing the value of the property without other proof as to its value than the statement in the petition; so also in assessing the value at eight hundred dollars, when the defendant only claimed in his answer two hundred and ninety-eight dollars and sixty-four cents. The amount ought not to exceed the value of his special interest. (2 Seaman v. Luce, 23 Barb. 240.)

*F. C. Sharp and C. S. Hayden*, for respondent.

I. The instruction of the court correctly declares the principles of the law of general average as applicable to this case. (1 Parsons on Mar. Law, 288, 195, 297; 2 Phill. on Ins. 1269, 1288; 10 How. 270, 314; Abbott on Shipping, 475; 2 Marsh. on Ins. 538.) The verdict of the jury embraced all the issues in the case. The court properly gave judgment for the value of the property. The statute has no reference to the common law action of replevin. There are no vacancies to be filled up by the common law. The statute "undertakes to cover the whole ground and present a complete system." (Collins v. Hough, 26 Mo. 153.) The words of the statute are plain and positive, and will not on this point admit of construction. (R. C. 1855, p. 1242, § 11.) The only issue decided by the jury was whether the plaintiff was entitled to the possession. This being the sole thing settled by the jury, how could any other judgment be rendered in the case than that which was given? The defendant, in the evidence he adduced, was governed by the issue to be tried. He might have had other claims upon the property than that he set up—might have been responsible to third parties for the rest of the property, but, knowing

that the only issue on the trial was the right to possession, he did not adduce such evidence. In short, the absolute and ultimate ownership of the property was not tried nor necessarily in question.

NAPTON, Judge, delivered the opinion of the court.

This was an action by the general owner of property against a person claiming a lien on it. The suit was prosecuted under the provisions of the seventh article of our practice act, and the property was delivered to the plaintiff. A verdict was found for the defendant, which, however, under the instructions of the court, simply determined that he was entitled to the possession of the property, and a subsequent proceeding was had to inquire into the value of the property, which resulted in its assessment at its absolute value, without any ascertainment of the extent of the defendant's interest. A judgment was accordingly rendered for the full value of the property, or for its return, at the option of the defendant.

Our statute provides that if the plaintiff fails to prosecute his action with effect and has the property in his possession, the value of the property shall be assessed by the court or jury, and the damages for the detention. The judgment, in the event of a verdict for defendant, is directed to be for a return of the property or the payment of its assessed value, at the election of the defendant, and for damages and costs.

We are not of opinion that this statute intended the entire value of the property to be assessed except where the defendant is the absolute owner. Where the defendant has only a special interest in the property, the jury or court should assess the value of that interest. To assess the absolute value in such cases would lead to manifest injustice, as the result in the present case may serve to illustrate. Here, the defendant only claimed a lien on the lumber sued for to an amount less than the fourth of its value, and he gets a judgment for four times the sum he claims, or for the return of the property, with the privilege of electing which of these judgments he will enforce. So that if this judgment is to be

held conclusive and matters are to remain in this position, he is put in possession, if he so chooses, of a sum of money to which he concedes himself to have no right whatever, or another suit must be had to give the parties their just rights. The real subject of controversy is left undetermined; the defendant's interest in the property is not ascertained.

It may happen in a suit of this kind, brought by the general owner of property against one who claims a special interest in it, that the defendant's interest in the property expires or is extinguished after the suit is brought and before judgment. In such an event the supreme court of Massachusetts held in one case that the judgment should be for costs only. (*Wheeler v. Train*, 4 Pick. 168)

It may happen again that the defendant is a bailee of the property, entitled to its possession for a limited period, which has not expired when the suit is tried. In such a case the value of the defendant's interest should be assessed and the judgment should be for that value or for the return of the property into the defendant's possession until his interest ceases.

The present is the case of a lien for a sum of money due from the plaintiff to the defendant. When the money is paid the lien ceases, and the defendant has no longer any right to the possession of the property. The judgment should be for the value of the defendant's interest, or for a return of the property until that value is paid, at the option of the defendant. Of course, if the plaintiff chooses to pay the amount of the lien, the defendant has no alternative but to receive it, and his right to the possession of the property ceases. But the plaintiff may not see proper to tender the money, in which event a judgment in the alternative, to be determined at the defendant's option, will give the defendant the advantage of selecting between an execution to enforce a moneyed judgment and the possession of the property until his claim is paid.

Where the defendant has only a special interest and the plaintiff is a *stranger*, then the entire value, according to

the ancient doctrine of the common law, may be recovered by the special owner, who is answerable over to the general owner for whatever interest remains after the special claim is satisfied. In such cases the general value of the property would be assessed without regard to the value of the special interest.

But this is not the case where the controversy is between the general and special owner. The judgment in each case must be modified by the circumstances, so that the merits of the controversy may be settled in one action. The statute is a general one, designed to meet all the exigencies which the old action of replevin did, and the equity of its provisions will embrace these modifications of the forms in which judgments should be entered. Such has been the construction in New York of a similar statute. (*Seaman v. Luce*, 23 Barb. 254-5; *Russell v. Butterfield*, 21 Wend. 302.)

The questions, on the trial, concerning general average, the circumstances under which it ought to be allowed, and the rules by which its burdens should be distributed, were not determined by the court of common pleas. In the view taken of the case it was unnecessary. The instructions on both sides were refused, and the only question submitted to the jury was as to the existence of the defendant's claim or lien. It is not necessary or perhaps proper that we should anticipate the action of the court on these questions in another trial; nor do we apprehend that there will be any serious difficulty in adjusting the rights of the parties on just principles. The instruction given by the court was, we think, right. An application of the principles upon which general average has been allowed in cases of sea-going vessels, would make the case proved upon the trial a proper one for contribution. It is settled that where the general safety requires a ship to go into port to refit, by reason of some peril, the necessary expenses of going into port and of repairing for the refitting the ship by unloading, warehousing, and reloading the cargo, are general average. (3 Kent Com., p. 236; *Abbott on Shipping*, 280.)

A point was raised by the testimony and discussed by the counsel in this court, as to allowing the plaintiff, in ascertaining his share of the general average, the value of his services and those of his servants and teams in unloading and perhaps in reloading the boat upon which his lumber was shipped. It appeared that the plaintiff, with his horses and servants, was employed for several days in hauling off his lumber from the keel-boat No. 17, and in fact that this work was done entirely and exclusively by his own workmen. The defendant's agents and workmen were, however, also engaged in protecting the boat from the ice and in moving her from point to point until she was finally landed. It does not appear that any other owner of freight on any of the other five barges, which were in the peril produced by the low water and ice, was present or contributed any aid or incurred any expense in securing the barges or their cargoes. In estimating the losses accruing from the expense of unloading the barges, the price of the plaintiff's services ought to be included in the general charges, and in determining his share of the general average the value of these services should be deducted from it.

The judgment is reversed and the case remanded. The other judges concur.

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CHAMBERS' ADMINISTRATOR, Respondent, v. SMITH'S ADMINISTRATOR, Appellant.\*

1. When a case has been retried in an inferior court according to the principles laid down in the decision of the supreme court, none of the questions, which were decided when the case was first in the supreme court, should be open for re-examination on a second writ of error or appeal, unless some general principle of law has been manifestly decided incorrectly the first time, or injustice to the rights of the parties would be done by adhering to the first opinion.

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\* This case was decided at the March term, 1859. It was continued on a motion for a rehearing.

*Appeal from St. Louis Land Court.*

The facts of this case are sufficiently set forth in the report of the cause when the same was in the supreme court for review before.

*Whittelsey*, for appellant.

I. The court should have arrested the judgment. The plaintiff had no cause of action if the breach of the covenants was made by the execution of the deed by Beckwith in December, 1848, as administrator by order of court. The heirs of Chambers, and not the administrator, were the proper parties plaintiff. (Rawle on Cov. 602; 10 Ohio, 442; 3 Dev. 200; 3 Mon. 95; Meigs, 187; 9 B. Monr. 48.) William Chambers died May 9, 1848. The heir of Chambers still holds the title to the lot, and can recover in ejectment—the act of the court and of the administrator of T. F. Smith, in making the deed, being void because E. B. Smith and the heirs of W. Chambers were not parties to the proceedings. The suit of Todd v. Smith's administrator was a void suit. T. F. Smith had no estate at the time of his death. (24 Mo. 87; 4 Johns. Ch. 559; 5 Johns. Ch. 193; 11 Paige, 277.) The land court had no jurisdiction of this cause. The suit was covenant, sounding in money damages entirely, and did not relate to land except collaterally. (Sess. Acts, 1853, p. 90; 20 Mo. 596.) (Plaintiff's claim is barred because not presented within three years.) (R. C. 1845, p. 91; 11 Mo. 237; 17 Mo. 557; 9 Mo. 225.) The breach has produced no actual damage. The heirs of Chambers have the title, and can demand the lot or the money due. The damages are excessive. Interest is computed from November 21, 1843, the date of the deed of Thomas to Elias B. Smith, and not from the date of the supposed breach.

*B. A. Hill*, for respondent.

I. The same points are made again by defendant that were made when this cause was here before. The judgment must

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Chambers' Adm'r v. Smith's Adm'r.

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stand unless the court should overrule its former decision. See brief in case when it was here before.

RICHARDSON, Judge, delivered the opinion of the court.

When the case of *Roberts v. Cooper*, 20 How. 467, was before the supreme court of the United States the second time, after it had been tried in the circuit court on the principles established by the supreme court in the first trial, it was decided that the court could not be compelled, on a second writ of error in the same case, to review their decision on the first; that after a case had been brought there and decided and a mandate issued to the court below, if a second writ of error was sued out it brought up for review nothing but the proceedings subsequent to the mandate; that none of the questions which were before the court on the first writ of error could be reheard or examined upon the second, and to allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute in the first, would lead to endless litigation; for there would be no end to a suit if every litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members.

The practical wisdom of these observations commend themselves to our consideration as particularly appropriate to the decisions of this court, which is liable to casual and periodical changes in its members, and for that reason a greater degree of conservatism is required than would perhaps be necessary in a court less subject to mutation. Whilst, then, we do not adopt the rule so forcibly stated in *Roberts v. Cooper*, in all its extent, we think it ought to be declared that when a case has been retried in an inferior court according to the principles laid down in the mandate of this court, none of the questions which were decided when the case was first here should be open to reëxamination on a second writ of error or appeal, unless some general principle of law has been manifestly decided incorrectly the first time, or injustice to

the rights of the parties would be done by adhering to the first opinion.

The report of this case, in 23 Mo. 174, shows that all the questions which the record now presents have been considered and decided, and the case seems to have been tried the second time, in the land court, in conformity to the opinion remanding the cause.

It is not disputed that Smith's administrator has recovered one thousand five hundred dollars which the estate has no shadow of right to, and the plaintiff is either entitled to that money or to the lot held by Mrs. Todd. In good conscience Mrs. Todd ought to keep the lot which she has paid for, and the plaintiff ought to have the money; and it would be hard to compel her to lose the lot and the money too which she paid to Smith's administrator; and it would be unjust, after telling the plaintiff that he could recover the money of the defendant, to tell him now that he has no right to it, but that he must look to his action of ejectment against Mrs. Todd, which may be barred by limitation, though it was not barred when he was advised by this court that his remedy was against the defendant and not Mrs. Todd.

There is no merit in the defence, and the manifest result of reversing the judgment for the technical reasons urged by the defendant would be to allow him to retain money which he must admit he has no right to, and to cause the plaintiff or Mrs. Todd to lose both the lot and the money.

This case presents a fair illustration of the rule we have considered, and none of the questions therefore will be reviewed which were considered when the case was here before.

The damages, however, are excessive, for which reason the judgment must be reversed; but the plaintiff having remitted the interest between November, 1843, and December, 1848, judgment will be rendered in this court. The plaintiff must pay the cost. (*Schilling v. Speck*, 26 Mo. 489.)

NAPTON, Judge. No opinion is intended to be expressed upon the point decided in this case when it was first before

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this court (23 Mo. 174) as to the character of the statutory covenant of seisin. I concur in affirming the judgment, on the ground that to review the former adjudication, in accordance with which the parties plaintiff had necessarily to conform their action, might now be attended with a loss of their right of action by reason of the lapse of time—a result which would be occasioned altogether by the action of this court. In such cases the opinions of this court should not be open to review.

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NEWMARK, Appellant, v. THE LIVERPOOL AND LONDON FIRE  
AND LIFE INSURANCE COMPANY, Respondent.

1. The liability of an insurance company for losses by thefts occurring at the time of a fire is not restricted to such losses occurring during the continuance of the fire merely; if the loss by theft be occasioned directly by the fire, the insurer will be liable though it happen after the extinguishment of the fire.
2. The affidavits and accounts of loss constituting the preliminary proofs furnished by the insured to the insurance company are evidence that the insured has complied with the stipulations of the policy in this respect; they are not evidence in favor of the insured as to the amount of the loss.
3. The admissibility of the testimony of skilled witnesses is, as a general rule, confined to a case where, from the nature of the subject, facts disconnected from such opinions can not be so presented to the jury as to enable them to pass upon the question with the requisite knowledge and judgment.

*Appeal from St. Louis Court of Common Pleas.*

This was an action by Abraham Newmark against the Liverpool and London Fire and Life Insurance Company to recover for a loss by fire on his stock of goods covered by a policy, issued by the said company, for five thousand dollars. There was another policy issued by the Citizens' Insurance Company on the same goods. The plaintiff claimed that his whole loss amounted to nine thousand and eighty-one dollars and forty-two cents, one-half of which, with interest, he claimed to recover of defendant. At the trial the plaintiff adduced proofs to show the amount of his

loss. The opinions of certain witnesses with respect to the capacity of the store of plaintiff were admitted in evidence in behalf of defendant. The character of this testimony is sufficiently set forth below in the opinion of the court.

The court, at the instance of the plaintiff, gave the following instructions: 1. If the jury believe from the evidence that only a portion of the goods mentioned in the plaintiff's petition was consumed by fire and damaged by water, but that the balance of said goods so alleged to be lost was, on account of the fire, stolen from said store so as to be lost to the plaintiff, then the same is covered by the policy of insurance of the defendant read in evidence, and the jury ought so to find. 2. The plaintiff is entitled in this action to recover for all the property burnt or damaged by either fire or water used at the time of the fire to extinguish it, as well as for such property as was stolen from the store of the plaintiff on the corner of Main and Locust streets at the time of the fire and caused or occasioned by the said fire, and which was not afterwards recovered by said plaintiff. 3. If the jury shall believe from the evidence that any witness in the cause has wilfully sworn falsely to any material fact in the case, they have a right to disregard all the testimony of said witness not corroborated by other truthful testimony. It is however the province of the jury to judge of the weight and credibility of each witness in the case."

The court, at the instance of the defendant, gave the following instructions: "1. The jury are instructed that it is their duty to ascertain from the evidence in the cause the amount of the plaintiff's loss and damage by the fire, and the recovery of plaintiff is limited to the one-half of the whole amount of loss or damage. 2. In ascertaining the amount of the plaintiff's loss or damage the jury are to consider and weigh all the facts and circumstances in the case, and to find their own verdict for the amount they believe from the evidence the plaintiff actually lost by the fire. 3. The plaintiff is entitled to recover for goods that were lost at the time of the fire, but not for any goods that were stolen before the

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fire, or that may have been stolen after the fire happened and was extinguished. 4. If the jury find from the evidence that in the plaintiff's account of loss furnished to the defendant he knowingly claimed and made affidavit that he sustained a larger amount of loss than he really and in truth sustained by the fire, with intent to defraud the defendant, then the plaintiff is guilty of fraud and false declaration, and can not recover any thing in this action. 5. The books of account of the plaintiff, produced in this cause, are not evidence before the jury, unless the same are proved by the parties making the entries therein or some person who examined or knew the same at the time of being made to be correct and true, and the entries made by the plaintiff himself can not be evidence in his favor except so far as they are shown by other evidence to be correct. 6. The affidavits and accounts constituting the preliminary proofs of plaintiff to defendant, produced in this cause, are not evidence of plaintiff's loss, nor of any thing in them contained except the fact that said proofs were made by the plaintiff for the defendant. 7. The jury is instructed that the proceeds of the damaged goods sold at auction belong to the plaintiff and not to the underwriters."

The jury found for plaintiff and assessed his damages at one thousand one hundred and sixteen dollars.

*H. N. Hart*, for appellant.

1. The third instruction given for defendant was erroneous and calculated to mislead. If the loss were directly traceable to the fire, the insurer is liable. (1 Phill. on Ins. § 624, 1107; 3 Penn. 471; 1 Sto. 157; 1 Holt, 149; 14 Mo. 3; 13 Ill. 676; Amer. Law Reg. 149.) There was no evidence whatever as to thefts before the fire broke out. Instructions should not be mere abstract propositions of law. (26 Mo. 393, 394; 4 Mo. 106; 8 Mo. 224; 21 Mo. 405; 25 Mo. 335; 27 Mo. 26.) The fourth instruction was erroneous. Fraud was not alleged in the answer. The fifth instruction was erroneous. The books of account were proven. Whether

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so proven as to go to the jury was for the court to determine. It was irregular to submit the question to the jury whether they were evidence or not. So the sixth instruction was erroneous. (2 Phill. on Ins. 643; Moore v. Protection Ins. Co. 29 Maine, 97.) Only one objection, purely formal, was offered to the admission of the preliminary proofs. (13 Ill. 676.) The evidence was before the jury. (21 Mo. 256.) The opinions of witnesses as to the amount of plaintiff's stock, as experts, were improperly admitted. The amount of plaintiff's loss, or the quantity and value of the stock in plaintiff's store at or before the fire, was not susceptible of proof by experts. No witness should have been allowed to testify who had no knowledge of the character and quantity of plaintiff's stock. (2 Tayl. Ev. 943; 1 Greenl. Ev. 440; 6 N. H. 463; 9 Cush. 337; 17 Wend. 163; 2 Conn. 514; 13 Conn. 81; 7 Conn. 72; 7 Cush. 319; 7 Wend. 78; 1 Green, 232; 3 Denio, 355; 3 N. H. 349; 1 Wheel. Cr. C. 205; 7 Mo. 231; 4 Conn. 203; 6 Conn. 9; 2 Hamm. 61; 7 Verm. 161; 4 H. & McH. 63; 20 Pick. 259; 16 Ohio, 513; 5 W. & S. 333.)

*B. A. Hill*, for respondent.

I. The instruction given with respect to the preliminary proofs was correct. (Kyle v. St. Louis Ins. Co. 11 Mo. —.) The court declared the law in the instruction concerning the stolen goods. The defendant was not liable for the loss of goods stolen before the fire or after it was extinguished, unless the fire was the cause of the goods being stolen. There was no evidence of any stealing except in one instance of a man who was caught. The instruction concerning the books of account was correct. The books were not evidence unless the entries were proved.

NAPTON, Judge, delivered the opinion of the court.

We consider the third instruction, which was given in this case for the defendant, as objectionable. The rule in relation to stolen goods had been sufficiently explained to the

jury in the first instruction given for the plaintiff, and the restriction of the liability of the company for thefts to the precise period when the fire was extinguished is not in accordance with the principle upon which such liability is based. That principle is alluded to in the instruction first given on this subject; the precise time when a theft occurs is not important, if it be occasioned directly by the fire. Such an instruction may have a tendency to mislead, especially as there was no evidence of any thefts having been committed before the fire happened or after it was extinguished.

The propriety of the fourth instruction given for the defendants is not material, since the jury found for the plaintiff upon the facts submitted to the jury on that instruction. But as the answer did not set up any forfeiture of the policy by reason of false or fraudulent affidavits in the preliminary proofs, the instruction was upon an issue not made by the pleadings and calculated to prejudice the plaintiff's claim.

The fifth instruction given for the defendants seems to have been designed to convey a proper caution to the jury in relation to the character and effect of the plaintiff's books of accounts as evidence. The phraseology of the instruction is perhaps awkward, if not ambiguous, and is objected to as leaving to the jury the question of the competency of this part of the plaintiff's evidence. If liable to this interpretation, the instruction would undoubtedly be objectionable; but we suppose it was simply intended to apprise the jury that the books were not evidence *of themselves*, as they have been and are considered in some courts, but that they should be regarded as entitled to no further weight than the proof of the witnesses who were examined in relation to their accuracy would justify.

The sixth instruction was, in our opinion, correct. The affidavits and accounts of loss, constituting the preliminary proofs, are evidence that the plaintiff has complied with the requirements of the policy in this respect, but they are no evidence in his favor upon the amount of loss. The affidavit required to be appended to every petition might as well

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be regarded as proof of the truth of its allegations. The contrary decision in *Moore v. Pennsylvania Insurance Co.*, 29 Maine, 97, seems to have no support in principle or upon authority.

Upon the trial of this case several witnesses were allowed to give their opinions of the amount of goods in value which the plaintiff's store would contain, and especially the value of the goods which could have been packed on the shelves destroyed by the fire. The witnesses were engaged in the same business followed by the plaintiff.

The general rule is that persons of skill in any particular science or art may give their opinions, "when the subject matter is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science or art as to require a course of previous habit or study in order to attain a knowledge of it." (Taylor on Evidence, vol. 2, § 1038.) The rule is evidently confined to cases where, from the nature of the subject, facts disconnected from such opinions can not be so presented to the jury as to enable them to pass upon the question with the requisite knowledge and judgment. There are some exceptions to this rule not necessary to be noticed in connection with the point taken here.

There can be no doubt that the evidence given in this case was of a very loose and unsatisfactory character. The two witnesses first called differed by ten thousand dollars as to the amount of goods which could be packed in the store; nor did either of them have any knowledge of the store and its contents before the fire. Their opinions seem to have been formed upon a mere inspection of the store after the fire, and an examination of the general character of the stock left. In the case of *Howard v. The City Fire Ins. Co.*, 4 Denio, 507, the witness was a clerk in a store immediately adjoining the one burnt, and proved the dimensions of the two stores to be the same. He also proved that previous to the fire an inventory had been taken of the goods in the store

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where he acted as clerk, and he was allowed, from the appearance of the two stores as observed by him, to give his opinion of the relative quantity of goods in the two stores. But in the present case, the opinions of the witnesses seem to have been formed without any peculiar advantages of arriving at correct conclusions. If they had confined their statements to facts, it is not seen that the jury could not have drawn as correct conclusions as the witnesses. Their opinions appear to be mere random conjectures.

The other judges concurring, the judgment is reversed and the case remanded.

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FINE *et al.*, Respondents, v. THE ST. LOUIS PUBLIC SCHOOLS  
*et al.*, Appellants.

1. The inhabitants of the city of St. Louis are incompetent jurors in a case in which the city is interested as party; for example, in a case in which the Board of President and Directors of the St. Louis Public Schools is a party. In such case the court should disregard the special act of March 5, 1855, (Sess. Acts, 1855, p. 527,) and direct the summoning, by special venire, of a jury from that portion of the county outside of the city limits.
2. The provision of the act regulating executions (R. C. 1845, p. 481, § 28,) directing the sheriff to divide real estate levied on and sell so much thereof as will be sufficient to satisfy the execution, is directory; a violation of its injunctions will not render the sale void.
3. Recitals in a deed of conveyance are not evidence in behalf of the persons claiming under the deed.
4. By the Spanish law a person might divest himself of title to his immovable estate by abandoning it; should he depart from it with the intention that it should be no longer his, this would constitute an abandonment. The question of abandonment is one of fact, of intent, to be determined by the jury from all the circumstances of the case.
5. An instruction given to a jury is erroneous if it is calculated to mislead them by inducing them to attach undue importance to a portion of the testimony and to divert their attention from other facts entitled to consideration. Instructions should not amount to a commentary on the evidence.
6. To establish a title to land by virtue of a confirmation by the act of Congress of June 13, 1812, it is not necessary to show any documentary title, or any permission to occupy, or any other title emanating from the Spanish government; proof of inhabitation, cultivation or possession is sufficient.

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7. It would be improper in an instruction to indicate to the jury that, in a case where the claim of the party was based upon possession and cultivation alone, testimony of less weight would be sufficient to make out an abandonment, than in a case where the claim was evidenced by a documentary title of some kind emanating from the Spanish government.

*Appeal from St. Louis Circuit Court.*

This is the same case which was heretofore in the supreme court. (See *Fine v. St. Louis Public Schools*, 23 Mo. 570.) The plaintiffs claim title to an undivided interest in the premises, a lot of one by forty arpens in the St. Louis common field, as heirs and legal representatives of Philip Fine, to whom said lot is alleged to have been confirmed by the act of Congress of June 13, 1812. Evidence was adduced by plaintiffs to show that said Fine cultivated and possessed the lot in controversy prior to December 20, 1803, and up to the time of the falling down of the fence, about six years before the change of the government. He then removed from St. Louis to the mouth of the Meramec river and continued to reside there until his death. The defendants adduced in evidence a designation and setting apart of the land in controversy for the support of schools. The remaining facts sufficiently appear in the opinion of the court.

The court gave the following instructions at the instance of the plaintiffs: "1. If the jury believe from the evidence that the lot described in the petition was one of a series of lots lying adjoining to each other, and having the same general range and uniform depth of forty arpens, and that Philip Fine, prior to December 20th, 1803, cultivated this lot in different parts thereof, claiming the whole, and while so cultivating it was an inhabitant of the then town or village of St. Louis; and that he was the last cultivator thereof before December 20th, 1803, and continued to claim the same until June 13th, 1812, they should find for the plaintiff. 2. And if the jury believe from the evidence that Philip Fine did cultivate the lot in controversy, as above stated, they should presume that he rightfully claimed it, when he so cultivated

it, and always afterwards claimed it until the contrary be proven."

The instructions given by the court, on its own motion, are set forth below in the opinion of the court.

The court gave the following two instructions at the instance of the defendants: "1. If the jury believe from the evidence that the land in controversy is not the same land that is said to have been cultivated by Philip Fine prior to the 20th December, 1803, they will find for the defendants. 2. Whatever may have been the right, title or claim of Philip Fine to the land in question, before the change of government, if the jury find from the evidence that he abandoned the same, the jury ought to find a verdict for the defendants. By abandonment is meant the quitting of the possession of the lot, with the intention that it should be no longer the property of the possessor."

The following instructions asked by the defendants were refused: "1. There is no evidence before the jury competent to prove that the tract of land in question, as described in the petition, did belong to Philip Fine, at any time, on or before the 20th day of December, 1803. 2. By the Spanish law, in force here until the change of government, the bare fact of cultivation or possession of a piece of land gave to the possessor or cultivator no right, title or claim to the land; on the contrary, it constituted him a trespasser. 3. If, during the existence of the Spanish government here, the land in question did belong to Philibert Gainon (or Laurent Rouge), the plaintiffs here can not recover in this action without showing a title derived from the said Gaignon (or Rouge), or showing that the land was re-annexed to the king's domain, and afterwards granted to some person under whom they claim title. 4. If Gaignon (or Rouge) owned the land and cultivated it in Spanish times, and died, and his widow cultivated it until she married Fine, and Fine cultivated it both before and after her death, all prior to the 20th day of December, 1803—upon these facts, the act of Congress of June 13, 1812, did not so operate as to confirm the title to

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the land to Philip Fine. 5. The act of Congress of June 13, 1812, does not give title to land, in any case, upon the bare fact of cultivation or possession thereof prior to the 20th of December, 1803. Besides that, in order to work a confirmation of title by the act, there must be a right, title or claim existing at the time of the cultivation or possession, and continuing down to the date of the act. 6. Unless it be shown to the satisfaction of the jury that the land in question was, before the change of government, a town or village lot, outlot, or common field lot, in, adjoining or belonging to the town of St. Louis; that Philip Fine inhabited, cultivated or possessed the same prior to the 20th December, 1803; and that the said Fine had a right, title or claim to the said lot beyond the mere fact of his cultivation or possession thereof, the plaintiffs can not recover in this action, as claiming through and under the said Philip Fine. 7. If, in Spanish times, Philip Fine, being an inhabitant of the town of St. Louis, possessed and cultivated the land in question, having no right, title or claim thereto, except such as might spring from such possession or cultivation; and if, before the change of government, he ceased to possess or cultivate the said land, and ceased to be an inhabitant of the town of St. Louis; and if he obtained a grant of a tract of land from the Spanish authority, fifteen miles or more from St. Louis, and made a farm upon it, and lived there with his family for more than twenty years, and died there, without ever again taking possession of the land in question, and without instituting any proceeding to establish his right to possess or own the same, he abandoned the land, and the plaintiffs here can make no title to it through or under him. 8. The jury are instructed that if the plat of the Spanish surveys read in evidence differs from the plat of the United States surveys read in evidence, the Spanish plat is entitled to the preference as better evidence than the United States plat. 9. If the jury believe from the evidence that, after Philip Fine is said to have cultivated the land in dispute, the officers of the Spanish government treated the same as a part of the public domain,

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and that said Fine never exercised any acts of ownership over said land after he is said to have ceased cultivating the same up to the time of his death, they may well presume that he abandoned said land at the time he is said to have ceased said cultivation, and find for the defendants."

The jury found a verdict for plaintiffs.

*Casselberry* and *E. Bates*, for appellants.

I. The court erred in ordering a special venire to be summoned outside of the city of St. Louis. (Sess. Acts, 1855, p. 527.) The third instruction was erroneously refused. The deeds read in evidence by plaintiffs described the land as a tract which was owned by Philabert Gaignon, alias Laurent Larouge, under the Spanish government. Plaintiffs showed no title under Larouge. The evidence showed that Fine abandoned the land about 1794, if he ever had possession. The court should have granted a new trial. It should have instructed the jury that they ought, under the circumstances, to presume an abandonment. The court should have rejected the sheriff's deed. Plaintiffs did not show any judgment. Besides, the sheriff sold the whole forty arpens in a lot. He ought to have sold the property in parcels corresponding with the blocks and streets in the city. (2 Greenl. Ev. § 316; 1 Holt's Cas. 589, *n.*; 1 H. & Gill, 172; *Evans v. Wilder*, 5 Mo. 319; 7 Mo. 362; *Evans v. Ashley*, 8 Mo. 177.) The recitals in the deed of Cuns to Fine were not evidence in favor of those claiming under Fine. Plaintiffs show no documentary title. A distinction should be taken between titles and claims under the act of June 13, 1812. When no written title or a concession is produced, a claim must not only be proved by showing that the lot was actually inhabited, cultivated or possessed prior to December 20, 1803, but that the claimant or his representatives continued to exercise acts of ownership over the land down to the passage of the act of 1812. For definition of claim see *Guitard v. Stoddard*, 16 How. 512; Code Napoleon, Laws 549, 930, 1926, 2102; Tom. Law D. tit. Claim; Plowd.

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359; Litt. § 420; Co. Litt. 250-2; 16 Pet. 615; 15 Mo. 302. See generally *Vasseur v. Benton*, 1 Mo. 212; 3 Mo. 168; 4 Mo. 458; 6 Mo. 333; 20 Mo. 162; 9 Mo. 347, 796; *Page v. Scheibel*, 11 Mo. 167; *Harrison v. Page*, 16 Mo. 182; *Soulard v. Allen*, 18 Mo. 590; *Soulard v. Clark*, 19 Mo. 570; *St. Louis v. Toney*, 21 Mo. 242; *Carondelet v. McPherson*, 20 Mo. 192; *Papin v. Hine*, 23 Mo. 274; *Fine v. Schools*, 23 Mo. 570; *Vasquez v. Ewing*, 24 Mo. 31; *Carondelet v. St. Louis*, 25 Mo. 448; *Funkhouser v. Langkopf*, 26 Mo. 453.) The testimony was wholly insufficient to authorize a verdict. The court below erred in refusing the first instruction asked. The court erred in refusing the seventh instruction asked by defendants. Philip Fine was not an inhabitant of a village after 1794. So also the court erred in refusing the ninth instruction. The land was treated by the government as abandoned. The court erred in refusing the instructions on the subject of abandonment which were asked by defendants, and also in giving instructions on that subject given on the court's own motion and at the instance of the plaintiffs. The instructions given entirely cut off all presumption of abandonment, and prevented the jury from taking into consideration any thing in relation to the presumption of abandonment by Fine or those claiming under him, and threw on defendants the necessity of proving abandonment affirmatively. The jury, under these instructions, could not take into consideration the many circumstances by which they could infer or presume abandonment. Abandonment is a question of law based on facts. (6 Mo. 336; 11 How. 96; 12 How. 434, 223; 13 How. 3; 15 How. 29; 12 Peters, 456; *Moreau & Carlton's Partidas*, 365; *Strother v. Lucas*, 6 Pet. 772.) This is a much stronger case of abandonment than is *Strother v. Lucas*. The court erred in admitting in evidence the *Soulard plat*, also the *township plat* marked A. The court erred in refusing the eighth instruction asked.

*Todd*, for respondents.

I. The first and second instructions given for plaintiffs are

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correct. (1 Mo. 296; 3 Mo. 368; 11 Mo. 167; 16 How. 509; 20 Mo. 162; 17 Mo. 210.) The instructions given on the court's own motion were correct. (11 Mo. 182; 20 Mo. 162.) The court did not err in refusing instructions asked by defendants. The instructions given embraced all the proper and practically useful law of the case. The first instruction refused was erroneous. It was immaterial whether the land belonged to Fine on or before December 20, 1803. His cultivating it did tend to prove ownership. The second instruction refused was a mere abstract proposition. It is against the legal presumption that the fact of possession implies a right. (11 Mo. 182; 16 How. 511.) The fourth instruction is wrong. It conflicts with the construction of the act of 1812 given in *Lajoie v. Primm*, and *Guitard v. Stoddard*. The fifth is wrong because the act of 1812 does give title upon the bare fact of possession. (*Id.*) The sixth is also erroneous for the same reason. The seventh is also wrong. The eighth also. It assumes that the plat of the Spanish surveys correctly represents these surveys. There were two plats, and they differ. These plats are not official acts. The surveys were of the lots as located in 1770 and 1772. The lots may not have been in the same precise location when Fine cultivated. The ninth instruction was properly refused. The jury were fully instructed as to the law of abandonment. The court properly ordered the summoning of a special jury. (11 Mo. 247; 1 Danl. Pr. 597; 2 Tidd's Practice, 788.) Both parties accepted the jury. The township map was properly admitted. It simply showed where the land was located as alleged in the petition. The defendants showed precisely the same thing by their surveys. The sheriff's deed to Fine is not void for the reason alleged. The deed is not void for the cause assigned. The deed to Fine of the town lot in St. Louis in March, 1792, was introduced to rebut evidence introduced on the part of defendants to show that Fine had previously left St. Louis. It showed that in 1792 Fine had a dwelling in St. Louis. The objection to the deed is general.

EWING, Judge, delivered the opinion of the court.

The special act of 1855 relating to jurors in St. Louis county was properly disregarded by the court in directing a special venire for a jury to be summoned outside of the city limits. The inhabitants of the city were not competent jurors. This point was not decided in the case of *Eberle v. The Schools*, 11 Mo. 261, (two of the judges making no allusion to it in their opinions;) but we concur in the conclusion of the judge (Scott) who gave an opinion on that point.

On the trial the plaintiff read in evidence, among other conveyances, a deed from the sheriff of St. Louis county to Joshua Fine for the tract of which the land in controversy is a part. The defendant objected to the evidence on the ground that the deed was void, the whole tract having been sold in one mass without being divided. The statute relating to the levy and sale of property under execution is directory, and a violation of its injunctions will not make void a sale for such cause, although it may be good ground for setting it aside, on proper application. (*Rector v. Hart*, 8 Mo. 460.)

The plaintiff read in evidence a conveyance from one Cuns to Fine, dated 1792, for a lot in St. Louis, which recited that Fine was then an inhabitant of St. Louis. This paper was read in rebuttal after the defendants had introduced evidence with regard to Fine's removal to and residence on the Maramec, and of his acquisition of land at that place prior to its date. One of the defendant's counsel erroneously assumes in his argument that the paper in question was a conveyance from Fine to Cuns, and bases his objections mainly upon this assumption. Fine, however, was the grantee, and the recital as to his place of residence at the time of the execution of the deed is the mere declaration of a third person, which was inadmissible. There is no rule of evidence that would make the recitals of Fine's grantor evidence in his own favor, or for those claiming under him.

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The rule respecting the nature and effect of recitals in deeds is reversed in this case, and the attempt here is not to set up the recital as an estoppel by one claiming adversely to the deed, but the party claiming under it seeks to use the recital in his own behalf. Although the recital, as it respects Fine's residence in St. Louis, was inadmissible, we see no reason why the fact that he bought a lot there should not go to the jury for what it is worth. Whether it is a circumstance of much or little importance as bearing upon the question of abandonment will be for the jury to determine, and for that purpose the deed might have been offered.

The instructions given by the court on its motion are erroneous. They are as follows: "If the jury believe from the evidence that Philip Fine cultivated this lot as stated in the first instruction given for the plaintiff, and that he in his own mind continued to claim it until the 13th June, 1812, then the jury should not find that he had abandoned his claim to it, and until the contrary be proved the jury should presume that he continued to claim. And although the jury may believe that Philip Fine quit cultivating said lot when the fence fell down, and went away to live on land on the Maramec river conceded to him, and made a farm thereon, and failed to prove up his claim to said lot under the act of 1824, these circumstances do not constitute abandonment of his claim to said lot."

In support of these instructions we are cited to the cases of *Page v. Scheibel*, 11 Mo. 183, and *Barada v. Blumenthal*, 20 Mo. 162. In the first of these cases, the court was asked to declare, as a matter of law, that the facts of removal from St. Louis to another place in the same county, which was made a permanent domicile prior to 1796; that the claimant ceased to cultivate the land, and that neither he nor his representatives set up claim to the same before any of the authorities of the United States under any act of Congress, nor exercised any act of ownership over the same, constituted an abandonment. This was held erroneous, and that the facts of removal and ceasing to cultivate were not neces-

sarily inconsistent with a continued claim; that there must be a quitting of the possession of the property with the intention that it should no longer be the property of the possessor. In the second case cited, the instruction asked and refused entirely threw out of consideration the question raised on the defence respecting abandonment, which was held to have been rightly refused, because there was evidence of abandonment which the jury should have been at liberty to consider. In the case before us the state of facts is different from that in the cases cited, and they do not sustain the ruling of the court in giving the instructions.

The Spanish law on the subject of abandonment declares that if a man be dissatisfied with his immovable estate and abandon it, immediately he departs from it corporeally with an intention that it shall no longer be his it will become the property of him who first enters thereon. (1 Partidas, Law 50, p. 365.) Abandonment is a question for the consideration of the jury and depends upon the intention, which is to be ascertained from circumstances. (Landes et al. v. Perkins, 12 Mo. 257. See also 20 Mo. 162.) What the claimant may have determined in his own mind, it is true, could only be known by his acts and conduct; but this phraseology of the instruction was calculated to give undue importance in the minds of the jury to certain evidence of Fine's declarations and to divert attention from other facts in the case entitled to consideration.

In the case of Page v. Scheibel, *supra*, it was obviously improper to give the instruction asked respecting abandonment under the state of facts proved, because there was evidence of a continued claim to the land, notwithstanding the claimant's removal from it and the acquisition of a domicile elsewhere. But it does not follow that it was proper to charge the jury, in this case, that similar acts or circumstances *did not* constitute abandonment; for if there was any evidence besides tending to prove abandonment, it was erroneous to select these facts from the mass and present them to the jury as being decisive of the case; for so the jury

would be inclined to regard them under such an instruction. While the charge directed the attention of the jury especially to the facts presented, it was calculated to impair the force of other evidence in the cause. In other words, it was in the nature of a commentary upon the evidence, and was calculated to mislead the jury.

If the fifth and sixth instructions are to be understood as declaring that a claim, right or title under the act of 1812 must be established other than by evidence of inhabitation, cultivation or possession, they are erroneous and contrary to what has been the settled construction of that act by this court, and the supreme court of the United States. (*Vasseur v. Benton*, 1 Mo. —; *Lajoie v. Primm*, 3 Mo. 368; *Page v. Scheibel*, 11 Mo. 167; *Guitard v. Stoddard*, 16 How. 510.)

The title of the claimant under this act does not depend upon proving the existence of a formal permission from the authorities of the former government to take possession of village lots, a survey thereof, or any documentary evidence of title thereto; and the act requires no such proof, but confirms the title upon possession, inhabitation or cultivation, without regard to the legality of the origin of such title. In *Guitard v. Stoddard*, *supra*, the court adopted the conclusions presented in the cases above cited, and observe that the act of 1812 makes no requisition for a concession, survey, permission to settle, cultivate or possess, or of any location by a public authority as the basis of the right, title and claim upon which its confirmatory provisions operate; that although there may have been originally no legitimate right or claim without some such authority, Congress, in the act of 1812, was not dealing with written or formal evidences of right.

The seventh instruction implies a distinction between a right, title or claim arising from possession or cultivation merely, and a claim or title of a supposed higher nature contemplated by the act of 1812; and also implies that less evidence would be sufficient to make out an abandonment in the former case than the latter. In this respect the instruc-

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tion is equally objectionable with the fifth and sixth, which we have seen give an improper construction to the act of 1812. If inhabitation, cultivation or possession alone was the basis of the confirmation under the act, such cultivation or possession implying a rightful claim, there was no ground for telling the jury that the absence of evidence of a higher right or claim than these facts conferred, was a circumstance for their consideration in determining the question of abandonment.

The remaining instructions need not be noticed in detail; we think they were properly refused. As to the plats read in evidence, we are of opinion they were admissible for the purpose for which they were offered; and the court very properly refused to charge the jury as prayed in the eighth instruction as to their relative weight as evidence.

Judgment reversed and the cause remanded. Judge Scott concurring.

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SPALDING, Appellant, v. CONZELMAN, Respondent.

1. If a person, already in possession of premises as tenant, verbally contract with the owner for a new term, his mere continuance in possession after the making of the alleged contract is not an act of part performance such as will justify a decree for the specific enforcement of the verbal contract.
2. In order that improvements made by a tenant continuing in possession under such circumstances may be entitled to much consideration, as bearing upon his right to a decree for a specific performance, they should be of such marked and important character as not to be naturally reconcilable with the continuance of the old relation.

*Appeal from St. Louis Land Court.*

A. M. & S. H. Gardner, for appellant.

I. The plaintiff was entitled to a decree. Possession was given to plaintiff; he expended money and made repairs and paid the instalments of rent. (15 Mo. 365; 2 Story's Eq. § 763.) It would be a fraud upon plaintiff if the contract

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is not fully executed. (20 Mo. 81.) Under the pleadings it was not incumbent on plaintiff to prove a written contract. Defendant does not set up in his answer the statute of frauds. (11 Mo. 659.)

*Spies & Burt*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action for the specific performance of an alleged agreement for the lease of a house and lot in the city of St. Louis.

The petition alleges that the defendant Conzelman, on or about the 9th of August, 1856, agreed with the plaintiff to lease him for the term of seven years, at the annual rent of eight hundred dollars, the premises therein described, a memorandum of which agreement in writing, in the form of a lease, was made by the defendant, and which is set out in the petition. It is further alleged that it was agreed by the parties that the lease to be made by the defendant was to contain certain covenants not specified in the memorandum which is set out in the petition; that the defendant promised to make and deliver to plaintiff a sufficient lease in writing of the premises on the terms contained in the memorandum, and certain others not therein specified; and that relying on said agreement plaintiff took possession of the property and expended a large sum of money in repairing it in a manner suitable to his business as a dentist; that he had paid defendant eight hundred dollars, being four quarterly instalments of rent, according to the terms of said leasing; that defendant has refused to execute a lease in writing or to sign any memorandum in writing by which the plaintiff would be legally entitled to the possession.

The answer denies the allegations of the petition, and especially that there was any agreement or memorandum in writing to lease the premises; but alleges that he proposed a lease to the plaintiff, and that he refused to accept the same, and in consequence of such refusal it was never

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signed by himself or plaintiff; denies that the plaintiff took possession of the property in consequence of any promise of defendant, but on the contrary that at and before the said 9th of August, 1856, plaintiff had possession of the same and had occupied and used the same for his said business; denies the payment of eight hundred dollars by plaintiff, but admits that he received six hundred dollars, three quarters' rent of said house, during the time occupied by the plaintiff; states that several propositions had been made verbally between the parties respecting a lease, but none of them were ever agreed upon, nor intended as a lease or a memorandum in writing for a lease; that a lease was drawn up, but plaintiff refused to sign it, and the same was therefore never signed by defendant, and that the plaintiff was regarded as tenant at will only.

On the trial the plaintiff read in evidence the memorandum of lease or paper set out in the petition, having first proved it to be in the handwriting of the defendant. This paper bears date August 9th, 1856, and purports to lease the property for seven years, to commence at its date, at the annual rent of eight hundred dollars, payable in quarterly instalments; it is not signed by either of the parties. A witness of the plaintiff, Franklin, who was the defendant's clerk, testifies to a conversation between the parties respecting a lease of the premises in question, in which he heard the plaintiff ask the defendant if he would sign it, to which the latter replied he had no objection to having a fire clause added to it; that the paper read in evidence was the one plaintiff had, and that defendant read it over at the time. The witness further stated that the plaintiff, in May, 1856, handed him, witness, a paper for defendant to sign, and said they had better have it fixed. In a few hours the plaintiff returned, (both parties occupying different tenements of the same house,) when the defendant remarked that that was the same paper that plaintiff had handed him before; thereupon plaintiff brought another lease which the defendant said was a little better than the other. A conversation ensued, in

which the defendant remarked they could not agree, and that he would not sign any lease; that he had drawn up one which the plaintiff would not sign; whereupon, being asked by the plaintiff if he refused to give him a lease, he answered that he did. It was proved that repairs were made by the plaintiff, consisting of papering, painting, &c., in the fall of 1856, of the value of some one hundred and fifty dollars. Receipts for rent, amounting to six hundred dollars, were produced, the last of which was for two hundred dollars—the instalment for the quarter ending August 9, 1857. This was the last rent received; the rent for the three months next thereafter was tendered to defendant, but was refused by him on the ground that a suit was pending between them about the house. It was also proved that the plaintiff was in the house before the defendant purchased it. A lease from one Cutter to the plaintiff was read in evidence, having been assigned to the defendant. This lease bears date 8th January, 1853, and is for the term of three years, commencing at said date, at the annual rent of eight hundred dollars, payable in quarterly instalments, and it stipulates, among other things, that all repairs deemed necessary by said lessee are to be made at his own expense.

The court gave the following instruction at the instance of the plaintiff: "That if the court find from the evidence that defendant, on or about the 9th of August, 1856, agreed to execute and deliver a written lease to the plaintiff of the premises in controversy, for the term of seven years, for an annual rent of eight hundred dollars, and that plaintiff was in possession of said premises under said agreement and made valuable improvements to the same before the refusal of defendant to execute a lease, and had paid to defendant the sum of eight hundred dollars by way of rent, then the plaintiff is entitled to a decree for the specific execution of the contract."

The plaintiff asked the following instruction, which was refused: "That the paper read in evidence by the plaintiff, proved to be in the handwriting of defendant, purporting to

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be an unexecuted lease from the defendant to the plaintiff, is sufficient evidence of an agreement to lease, and of the terms and conditions of said agreement; that the plaintiff is entitled to a decree requiring said defendant to execute and deliver to said plaintiff a lease for said premises, for the terms and upon the conditions set out and specified in the paper read in evidence by the plaintiff and purporting to be an unexecuted lease from the defendant to the plaintiff."

The theory of the plaintiff's case, according to the instruction given at his instance, and as argued by his counsel, would seem to be that there was a parol contract between the parties to give a lease of the premises, which he is entitled to have specifically executed by reason of such part performance as takes the case out of the statute of frauds; and that the paper read in evidence may be resorted to as showing the terms of the contract. The instruction refused assumes that there was an agreement to execute a lease, and declares that the paper is sufficient evidence of it.

The meaning of the instruction is certainly not very clear. The paper, being unexecuted, could be no evidence of an agreement unless it had been made so by being referred to in some written contract entered into between the parties and thus made a part of it, and it is not pretended that any such writing exists. But had there been a verbal agreement to execute a lease, upon what rule of evidence would this paper be admissible for any purpose upon the state of facts in this case? It is not pretended that there is any thing in the case that would warrant its introduction as a memorandum made by any witness at the time, which he could have used to refresh his recollection of the terms of the alleged agreement, and as such it could not, of course, be used as independent evidence. The defendant in his answer admits that there was a verbal letting, but for no definite time or specified terms, and that the plaintiff then being in possession, he regarded him as a tenant at will only. But there was no evidence of an agreement to give a lease for the term and

according to the conditions contained in the paper referred to. The plaintiff's own witness clearly proves that the parties could not agree upon a lease, and that none of the propositions were accepted. There was nothing upon which to predicate the instruction, and it was rightly refused.

With regard to the question of part performance, the evidence shows that the plaintiff was in possession at the time of the negotiation, and that it was not assumed by him or delivered to him in pursuance of the contract alleged. If one, already in possession of land as tenant, verbally contract with the owner for a new term, his merely continuing in possession after the making of the alleged contract is not an act of part performance within the meaning of the rule so as to justify a decree for a lease according to the contract. The continued holding does not necessarily imply any new agreement, but is naturally and properly referable to the old tenancy. (*Maphet v. Jones*, 1 Swanst. 172; *Chinly v. Barnhurst*, 14 Penn. 260.) The mere taking or holding possession is unimportant. *Quo animo* it is taken or held, is to be considered, and this question is not allowed to be answered by parol proof of the agreement between the parties. (3 Ves. 378.) So also the mere payment of additional rent, where an agreement for a new lease is set up, is a circumstance of little importance, inasmuch as it may be referred to a holding from year to year after the expiration of the old lease, or to other inducements to its payment. (*Brown*, Stat. Frauds, § 479.) Whether improvements made by the tenant continuing in possession is a circumstance entitled to much consideration, as tending to show a change in the holding, would of course depend upon their nature and character. To give this fact any weight in such a case, it is said that the improvements should be of such marked and important character as to be not naturally reconcilable with the continuance of the old relation. In *Brennan v. Ballin*, 2 Dru. & War. 349, Chancellor Sugden said that where the improvements which were made and the alleged expendi-

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ture by the tenant were no more than what would take place in the ordinary course of husbandry, it would be against all authority to say that such acts amounted to part performance.

Judgment affirmed ; the other judges concurring.

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MORRISON *et al.*, Respondents, v. McCARTNEY, Appellant.

1. A drawer of a check is not discharged by any laches of the holder in not making due presentment thereof, unless he has suffered loss or injury by the delay.
2. A., on the 2d of October, 1857, drew a check on B., a banker, in favor of C., who, on the same day, transferred the same for value to D. On the 3d of October, about two o'clock in the afternoon, the banking-house of B. suspended payment. On the 6th of October, 1857, A., who had previously instituted suits by attachment against B. to recover the amount of his deposits, compromised the same and received his deposits. The check was not presented until January 29, 1858, when payment was refused. The check was then duly protested and notice given. *Held*, in a suit by D., the holder, against A., the drawer, that the latter was not discharged by the delay.
3. By the forty-fourth section of the first article of the act concerning banks and banking institutions, approved March 2, 1857, all checks drawn on bankers and made payable in currency were made payable in silver and gold or the notes of specie-paying banks.

*Appeal from St. Louis Circuit Court.*

The facts in evidence are sufficiently set forth in the opinion of the court. The court gave the following instructions at the instance of the plaintiff: "1. The jury are instructed that the mere fact of delay in presenting for payment a check for which the holder has given a valuable consideration is not sufficient to release the drawer of such check from liability to pay the same after it shall have been presented, protested for non-payment, and notice of protest given to the drawer within a reasonable time thereafter, unless some loss was in fact caused to said drawer by such delay; and if the jury shall believe that the check here sued on was received for value by the plaintiffs, and that before the commence-

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ment of this suit said check was presented by them for payment at the banking-house of E. W. Clark & Bros. during the usual business hours of the day, was protested for non-payment, and notice of protest and that he was looked to for payment was given to said defendant the day of or the day after said protest; and they also believe that no loss did in fact result to the defendant from the plaintiffs' delaying to present said check for payment until the 29th day of January, 1858, then the plaintiffs are entitled to recover. 2. The question for the jury in this case is whether by the delay of plaintiffs in presenting said check for payment any actual loss accrued to the defendant; and if the jury believe from the evidence of the plaintiffs that no loss has in fact accrued to the defendant from the delay of plaintiffs in making such presentment, and also believe that plaintiffs were and are holders for value of the check sued on, and that said check was presented for payment, payment refused or not made, and said check protested for non-payment, and notice of such protest and that he was looked to for payment was given on the following day to the defendant, then the plaintiffs are entitled to recover."

The court, of its own motion, gave the following instructions: "1. If the jury believe from the evidence that before the check sued on was presented for payment, the defendant had withdrawn from E. W. Clark & Bros. the entire fund against which said check was drawn, then the burden of proof is on the defendant to show that he did sustain loss by the delay of the plaintiffs in presenting said check. 2. The jury are instructed that for the purposes of this action it is wholly immaterial whether the check sued on was drawn by defendant as an individual, and upon a fund belonging to him alone, or was the check of a firm composed of said defendant and other persons doing business under the style of Samuel McCartney, and upon a fund in fact belonging to said firm. 3. If the defendant, on the 2d of October, 1857, drew the check in question upon the firm of E. W. Clark & Bros., bankers, payable in currency, in favor of H. G. Bohn & Co.,

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for value, and said Bohn & Co. delivered it to plaintiffs for value, and on the 6th of October, 1857, the defendant withdrew or obtained the whole of his funds from said bankers, and between said 2d and 6th days of October currency depreciated in value, and said check, after defendant had so withdrawn or obtained his funds, was presented to said bankers for payment, and that payment was demanded or refused, and said check was protested for nonpayment, and that defendant was notified thereof within a reasonable time and that he would be looked to for payment, then plaintiffs are entitled to recover the amount of said check, less the amount of depreciation of currency which may have taken place between said 2d and 6th days of October, with interest thereon at six per cent. from the commencement of this suit. 4. If the jury believe that defendant drew the check sued upon, and before it was presented the defendant withdrew or obtained from the bankers the whole amount of his funds applicable to the payment thereof, and that plaintiffs were holders of the check for value, and after said funds were withdrawn or obtained from said bankers, and within a reasonable time, the plaintiffs caused said check to be presented at the bankers for payment, and that payment was demanded and refused, and that the check was thereupon protested for nonpayment, and that defendant was notified of these facts and that he was looked to for payment thereof, then the plaintiffs are entitled to recover the whole amount of the check, with six per cent. interest thereon from the commencement of this suit, unless you believe that the defendant sustained actual prejudice or damage by reason of the delay in presenting the check."

Various instructions asked by the defendant were refused. The jury found for plaintiffs.

*F. C. Sharp*, for appellant.

I. A check is in legal effect an inland bill of exchange. The parties thereto have the same rights and are subject to the same liabilities as in case of inland bills. (Byles on Bills, 73; 8 Mo. 382.) The check must be presented with due diligence.

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A failure to do so, and to notify the drawer in case of dishonor, releases him. (28 Mo. 162.) The check must, at the farthest, be presented the day after it is drawn, if parties live in the same city. (Byles on Bills, 79, 81; Chitty on Bills, 384; Sto. on Prom. Notes, § 493; 8 Mo. 382.) The suspension of the drawees will not excuse the failure to present. (Chitty on Bills, 383; Byles, 267; 5 Taunt. 30.) The presentment in this case could have been made. The drawer did sustain loss. The subsequent withdrawal of a part or all the drawer's effects will not render him liable. (28 Mo. 162.) The court erred in excluding the testimony offered to prove still further loss. The instructions given by the court of its own motion were erroneous. The instruction declaring that if the jury find certain facts, then the defendant would be released only *pro tanto*, is erroneous.

*Hitchcock*, for respondents.

I. Mere delay to present a check not causing actual loss to the drawer, is no defence to a suit on such check against the drawer by a holder for value, after demand, protest and notice before suit. If there be any loss to the drawer by reason of such delay, it diminishes the drawer's liability only *pro tanto*. (3 Kent, Com. 88; 4 id. 549; 6 Cow. 490; 3 Johns. Cas. 5; id. 259; 2 Hill, 425; Story on Prom. Notes, § 497; Byles on Bills, 78; 1 Kelly, 304; 2 Story, 502; 5 Sand. 326; 2 Duer, 584; 4 Seld. 590.) This check was for currency; (Farwell v. Kennett, 7 Mo. 595;) not a bill of exchange. The forty-fourth section of the act concerning banks, &c., can not be invoked by defendant. Either the check is a currency check, and then no bill; or it is a specie check, and then no damage.

NAPTON, Judge, delivered the opinion of the court.

This was a suit by Morrison and Lackland upon a check, payable in currency, drawn by the defendant upon E. W. Clark & Brothers, bankers in St. Louis, in favor of Bohn & Co., and endorsed to plaintiffs. The check was dated and

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delivered to Bohn & Co. on the 2d of October, 1857, and transferred by endorsement to the plaintiffs on the same day. It was not presented to the drawees until the 29th of January, 1858, when payment was refused, and it was duly protested and notice given to the defendant. It appears that about three o'clock of the 3d of October, the house of Clark & Brothers was closed or stopped payment; but on the 6th of October, 1857, the defendant, who had previously commenced suits by attachment, compromised these suits, settled with Clark & Bros. and withdrew his deposits. The question in the case was whether the plaintiffs were entitled to recover, notwithstanding their failure to present the check on the day after it was endorsed to them, upon showing that the drawer sustained no injury by the delay, and that before suit brought, and within a reasonable time, demand, protest and notice were duly given.

The law on this subject is stated in Kent's Commentaries, as follows: "The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. The check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of his banker to the holder of the check, and there it ought to remain till called for; and unless the drawer actually suffers by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the drawee's failure, and he may, under circumstances, be deemed to have made the check his own to the discharge of the drawer. But this is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the endorser, who has a right to require diligence on the part of the holder to relieve him from responsibility." (4 Kent. 549.)

This view of the law is adopted by Judge Story in the chapter, in his work on promissory notes, devoted to the subject of checks. His language is that "the drawer (of a check) will at all times be liable to pay the same, if the

holder can show that the drawer has sustained and can sustain no loss or damage from the omission to demand payment, at an earlier date, of the bank or banker on whom the check is drawn." "In case of a check," says Judge Story, "the drawer is treated as in some sort the principal debtor, and he is not discharged by any laches of the holder in not making due presentment thereof, or in not giving him notice of the dishonor, unless he has suffered some loss or injury thereby, and then only *pro tanto*." (Story on Prom. Notes, 492.)

The same doctrine is maintained in the most recent decisions of the highest courts of New York. (*Little v. Phoenix Bank*, 2 Hill, 425.) The opinion of Judge Cowen, in *Hawkes v. Anderson*, 21 Wend. 372, has not been sustained. In a word, this opinion appears to prevail generally both in England and in the United States, where the question has arisen. (*Alexander v. Burchfield*, 3 Scott, N. R. 558; *Robinson v. Hawkeford*, 9 Q. B. 52; *Byles on Bills*, 14, and note 2.)

The justice and policy of the rule are sufficiently obvious, and are forcibly alluded to and illustrated by Judge Story, in his opinion in the matter of *Brown*. (2 Story R. 516.) "If the drawee, upon the presentment, refuses to pay the clerk because he has no funds, then the drawer is not injured; and if he has funds, and refuses to pay, then, if the bank is still in good credit, as the drawer has sustained and can sustain no loss, there is every reason to hold him liable therefor. Every check is *prima facie* presumed to be given for value received by the drawer; and if, by reason of the want of due presentment or want of due notice of the dishonor, he is to be totally exonerated, he pockets both the original consideration and his funds in the hands of the bank or banker. In such a case, can it be said, with truth or justice, that he is to be enriched at the expense of the holder of the check? or that he shall not be deemed to hold the money as money had and received for the use of the holder, either because he had no funds in the bank or because he still retains those funds appropriated to the use of another for his own use?"

The argument seems to be conclusive; whether it is not

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just as applicable to bills of exchange is another question not necessary to be considered. (See Edwards on Bills, p. 396.)

In the case of *St. John v. Homans*, 8 Mo. 382, decided by this court in 1844, the judgment turned upon the fact of a loss to the drawer of the check. An opinion was expressed that the weight of authority recognized no distinction between the degree of diligence required in checks and bills of exchange in determining the responsibility of the drawer. However that may have been at that time, the current of authority now is, as we have seen, decidedly the other way.

The forty-fourth section of the first article of the act concerning banks and banking institutions, passed in 1857, declares: "That all drafts, notes, money orders, bills of exchange and checks drawn by individuals, companies, private firms, brokers, bankers, banking-houses, on banks or brokers, banks or incorporated companies, payable in currency, are hereby made payable in silver and gold, or the notes of specie-paying banks of the state of Missouri; and all such paper drawn by any bank, broker or incorporated company on any individual, company, private firm, or incorporated company, shall be payable in like manner."

By this provision it is clear that the check upon *E. W. Clark & Bros.* was payable in specie. The inquiry, at the trial, concerning the depreciation of currency from the first to the sixth of October, was therefore irrelevant. It is of no consequence whether the instructions on this subject were correct or not, since it is plain that the defendant was not prejudiced by them. It was of no importance to the defendant whether currency depreciated or not during the period intervening between the date of the check and his withdrawal of his funds from the house of *Clark & Brothers*, since the check, although expressed to be payable in currency, was by law payable only in specie or in the notes of specie-paying banks of this state.

The other judges concurring, the judgment is affirmed.

FARRELL, Respondent, v. FRITSCHLE *et al.*, Appellants.

1. In the case of the non-payment of a negotiable promissory note, which has been negotiated, the four per cent. damages, allowed by the seventh section of the act concerning bills of exchange and negotiable promissory notes, (R. C. 1855, p. 294,) can not be recovered, if payment of the principal sum, with the interest and charges of protest be made within twenty days after demand or notice of dishonor.
2. If suit be brought on such a note within twenty days from the maturity of the note, the plaintiff will not be entitled to the four per cent. damages.

*Appeal from St. Louis Circuit Court.*

*Decker & Voorhis*, for appellant.

I. The right to recover damages does not accrue until the period of twenty days from maturity has elapsed. (R. C. 1855, p. 295, § 11.) If suit be instituted between maturity and the period of twenty days thereafter, plaintiff has no cause of action so far as damages are concerned.

*Burke and Mauro*, for respondent.

I. The principal sum was not paid within twenty days after demand. The plaintiff was entitled to recover damages.

SCOTT, Judge, delivered the opinion of the court.

This was a suit upon a negotiable promissory note by endorsee against maker and endorsers. Upon the trial it appeared that the suit was brought within the period of twenty days from the maturity of the note. The court gave judgment for the amount due on the face of the note, with damages at four per cent., and interest on the sum of the principal and damages from maturity. The allowance of the four per cent. damages is the matter of which complaint is made.

The eleventh section of the act concerning bills of exchange provides that "in cases of non-acceptance or non-payment of a bill drawn at any place within this state on any person at a place within the same, no damages shall be recovered, if payment of the principal sum, with interest and charges of

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protest, be paid within twenty days after demand, or notice of the dishonor of the bill." The fifteenth section of the act places negotiable promissory notes on the same footing as inland bills of exchange, if the notes are negotiated.

As this suit was brought within twenty days from the maturity of the note, we can not see that the plaintiff had any right to the four per cent. damages at the time of bringing his suit. If he has commenced his suit for damages before they were due, he can not recover. Judge Napton concurring, the judgment will be reversed and judgment will be rendered for the principal and interest without the four per cent. damages, and the costs of this court will be paid by the plaintiff.



BAY, Respondent, v. SULLIVAN *et al.*, Appellants.

1. If a third person voluntarily convey a chattel to a trustee in trust for the separate use of the wife of another, it will be held free and clear of all claims of the creditors of the husband; to constitute the transaction fraudulent as against the creditors of the husband, the consideration must come from the husband.
2. Where the instructions given to the jury fully state the law applicable to the facts, the refusal of other instructions asked will not be error, although such instructions may be correct.

*Appeal from St. Louis Circuit Court.*

This was a suit for the value of a horse. The horse was sold by a constable under two executions, one in favor of Sullivan, the other in favor of Westcott, both of whom are parties defendant in this suit. The levy was made by order of both of the defendants. Upon claim being made by the plaintiff in this suit, separate bonds were given to the constable, who proceeded to make sale. At the trial the defendants separately moved that they might be separately examined as witnesses, each in behalf of his co-defendant. The court refused so to rule. The plaintiff read in evidence the certificate of record

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*Bay v. Sullivan.*

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of the bill of sale of said horse by Talbot to Bay. The remaining facts are sufficiently set forth in the opinion of the court.

*A. J. P. Garesché*, for appellants.

I. It was error to allow the reading of the certificate of record. It imparted no notice of sale. (15 Mo. 416.) The defendants should have been permitted to be sworn in each other's behalf. (Sess. Acts, 1857, p. 180; 9 How. Pr. R. 389; 10 id. 389; 19 Barb. 317.)

*Bay*, for respondent.

I. The court very properly refused to permit defendants to testify for each other. They were co-trespassers. The court did not err in giving or refusing instructions.

SCOTT, Judge, delivered the opinion of the court.

J. S. Talbot conveyed a horse to the plaintiff Bay in trust for the sole and separate use of Flora Byrne, the wife of Edmond Byrne. In the instrument of conveyance it is recited that the sale of the horse was in consideration of one hundred and thirty dollars paid by Flora Byrne and the sum of one dollar paid by the trustee Bay. The horse thus conveyed to Bay was levied on by the constable by the direction of the defendant Sullivan, who had an execution against Edmond Byrne, the husband of Flora Byrne. The horse was sold, and this suit was brought to recover in damages his value. There was a verdict for the plaintiff. The court instructed the jury to the effect that if the horse was purchased of Talbot with money of Dr. Byrne, and was conveyed by Talbot to Bay as trustee of Flora Byrne for the purpose of avoiding the creditors of Dr. Byrne, and that the constable levied on and sold the horse in favor of creditors of Dr. Byrne existing at the time of the purchase from Talbot, then there should be a verdict for the defendants.

As the only question in the case was whether the conveyance was fraudulent as being made to hinder and delay the

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Bougher v. Kimball.

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creditors of Byrne, we are of the opinion that the instruction given by the court fully stated the law on that subject. The defendant has no cause of complaint for the reason that his instruction in relation to the same matter was not given.

The second instruction asked by the defendants was that the bill of sale of itself was no evidence against them, either of the value of the horse, or of the person by whom the money was paid. The verdict of the jury shows that, in estimating the value of the horse, they were not governed by his price as fixed in the bill of sale. We would not therefore disturb the verdict on this ground. As to the bill of sale being no evidence that the wife paid the purchase money for the horse, it was not necessary, to give her the property in him, that she should have paid any thing. If Talbot had voluntarily conveyed the horse to her separate use, the creditors of the husband would have no right to subject him to their executions. The question was, whether the horse was paid for with the money of the husband.

The third instruction asked by the defendants was clearly erroneous. It maintains that if a wife, with the intent to secure her separate property from the debts of her husband, conveys it to a trustee, the transaction will be fraudulent.

We see no error in the second instruction given by the court. Judge Ewing concurring, the judgment will be affirmed. Judge Napton absent.



BOUGHER, Respondent, v. KIMBALL *et al.*, Appellants.

1. A. served as mate on board a steamboat from April, 1854, to August, 1854, when the boat was laid up. When the boat stopped running, a portion of A.'s wages was due him. The boat commenced running again in October, and continued until December, 1854, A. serving as mate. As late as December only a portion of the wages due for services rendered previous to August was paid. A. also served as mate on board said boat from March, 1855, to July, 1855. The receipts entered in the books of the boat during this last mentioned period showed that A. was paid in full for each trip of the boat. *Held*, that upon these facts there was no legal presumption of the payment of the sum due A. when the boat was laid up in August, 1854.

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Bougher v. Kimball.

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*Appeal from St. Louis Law Commissioner's Court.**Krum & Harding*, for appellants.

I. So far as the defendants Kimball and Ware were concerned plaintiff's receipts raise a presumption of payment of the wages due August 26, 1854; it was error to refuse defendants' first and second instructions. (1 Pick. 332; Coxe, 35.) Upon the evidence under the law as declared in defendant's third instruction, the defendants Kimball and Ware were entitled to judgment in their favor. The plaintiff, a river man, would hardly have run upon the same boat so long after August 26, 1854, without demanding his back wages; nor would he have delayed his suit against the owners until March, 1857, if he had not released the boat and her owners by some arrangement. The instruction given in behalf of plaintiff was manifestly erroneous.

*Rankin and C. S. Hayden*, for respondent.

I. The facts raise no legal presumption of payment. There was no receipt in full, no settlement made or adjustment of matters between the parties. (17 Mo. 40.) There were merely particular specified payments or receipts. It is for the jury to say, from all the evidence in the case, what the effect of such payments or receipts is. (Reed v. Phillips, 4 Scam. 39; 7 Halst. 104; 9 Mo. 63.) Besides, the evidence, which appellants allege raised the presumption of payment, was explained by other evidence.

EWING, Judge, delivered the opinion of the court.

This was an action against the defendants as owners of the steamboat Columbus to recover the balance of one hundred and fifty dollars for wages due the plaintiff as mate on said boat for the month of July and up to 26th of August, 1854, at the rate of one hundred and fifty dollars per month. The plaintiff proved his services and their value. It appeared from the testimony of Parker, clerk of the boat, that the plaintiff shipped on board as mate, in February, 1854, and

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Bougher v. Kimball.

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remained until 26th of August, when the steamer was laid up; that she came out again in October, when he went out again as mate and was mate on her when witness left her in December, 1854; that on the 26th of August there was due the plaintiff for wages as mate, the sum of two hundred and ten dollars and forty cents, which was not paid or settled so late as the 6th of December, 1854—the time witness left—except thirty dollars paid between the two last mentioned dates. The plaintiff also gives credit for a like sum paid by the master of said boat, Fulton, shortly after the due bill was given by Parker, the clerk. This due bill Parker states was given to the plaintiff by him to represent the balance due him at its date in August, 1854, without any reference to his monthly or annual wages. The evidence of Lee, clerk of the boat from the 12th of March, 1855, to 23d of July, 1855, shows that plaintiff was mate on the boat for the first four trips while witness was on her, and was paid by witness for every trip during the time he (witness) was on her until the 16th of June, 1855. He was paid in full for each trip, and receipts were given and entered on the portage book of the boat. The plaintiff, in the summer of 1855, said to witness that there was money due him for services, for which a due bill had been given him by Fulton. The receipts of plaintiff, as shown by the portage book produced, are for the amount paid for each trip, and purport to be in full for each trip only; witness did not know whether plaintiff had been paid for services in July and August, 1854, or not; but the books of the boat showed no indebtedness to him while witness was clerk.

Upon this state of facts the court was asked to declare that there was a presumption of payment; that the continuance of the plaintiff on the boat as mate after the demand sued on accrued, that is, from August 26, 1854, to June, 1855, and settlements from time to time, and the receipt by the plaintiff of his pay for subsequent trips, created a presumption, in the absence of rebutting proof, that the sum claimed has been paid. This instruction was refused, and instead

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Lawrence v. Dobyns.

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thereof the court declared substantially that the receipts in evidence, though admissible as circumstantial evidence tending to prove payment for the time sued for, are not conclusive, but are merely to be weighed by the court sitting as a jury.

There was no error in refusing the instruction asked by the appellants as to the legal effect of the receipts read in evidence. There could be no inference or presumption of law from these facts that the sum claimed had been paid. The receipts were for specific sums, each covering a given period of time, and expressed to be in full for each trip of the boat only. The circumstance of the receipt of money for services rendered subsequent to the time the claim in suit accrued could raise no presumption of this kind, for the receipts, in express terms, show that the wages, which they acknowledge to have been paid, accrued during a period different from that to which the claim sued on related. The plaintiff was employed as mate at different times during the years 1854 and 1855, and in every instance the receipts read in evidence specify particularly the time he was employed, the commencement and termination of the services, and the amount of wages paid for that period; and to have construed the receipts as asked by the appellants, would have given them an effect not warranted by any fair import of their terms, nor the understanding of the parties. Judgment affirmed.

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LAWRENCE, Respondent, v. DOBYNS *et al.*, Appellants.

1. A. executed a negotiable note in favor of B. The note was endorsed by B. in blank. This endorsement was made by C. as agent of B., and under or following the name of B. was the following: "Without recourse, C." D., the person to whom the note was thus endorsed, transferred the same for value to E. *Held*, inasmuch as B.'s endorsement seemed to be unqualified and such as to attach to him a general liability, that it was immaterial what understanding may have existed between C. and D.; it could consti-

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Lawrence v. Dobyys.

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tute no defence to B. as against E., a subsequent *bona fide* holder without notice of such agreement.

2. Where a note is made payable at a particular place, presentment at that place is sufficient in order to charge an endorser; the holder is not bound to present it elsewhere or personally to the maker.

*Appeal from St. Louis Law Commissioner's Court.*

The facts sufficiently appear in the opinion of the court.

*Gillespie*, for appellant.

*Wise*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action before a justice of the peace on a negotiable note for one hundred dollars, made by Page & Bacon, payable to the order of Dobyys, at their office, and subsequently transferred to Lawrence, the plaintiff. There was a judgment for the plaintiff before the justice, from which there was an appeal to the law commissioner's court, where, upon a trial by a jury, plaintiff again obtained a verdict and judgment, and Dobyys brings the cause to this court by appeal. The note was duly protested, and the notary states that he demanded payment of Daniel D. Page, one of the partners of Page, Bacon & Co., at their office, and on the day of its maturity gave notice to Dobyys, the endorser. The note was endorsed by Dobyys in blank, and under or following his name are the words "without recourse, S. J. Levi." Levi appears to have been the agent of Dobyys and to have negotiated the note with one Murphy, and Murphy subsequently sold and transferred it without endorsement to the plaintiff for seventy-five dollars.

The defendant offered to prove by Levi the consideration of the note, and the circumstances attending its sale and transfer by him (Levi) to Murphy, which evidence, on the objection of the plaintiff, was excluded. Murphy, and another witness, who was present, testified, without objection, as to the circumstances connected with the transfer of the note

to the plaintiff. If the object of the evidence (as seems to have been the case) was to prove that Murphy was to take the note without recourse against Dobyns, and that the purpose of his (Dobyn's) endorsement was only to pass his title to it without incurring any liability as endorser, it was rightly rejected; for, although such may have been the understanding between Murphy and Levi, and the authority of the latter as the agent of Dobyns may have been restricted to this kind of a negotiation of the note, yet the endorsement of Dobyns appears to be unqualified and such as to attach to him a general liability; and even if evidence of such an understanding or agreement would have been competent, it could be no protection to Dobyns against a subsequent *bona fide* endorsee without notice of such agreement.

One of the instructions, asked by the defendant and refused, assumes that unless it was proved that the firm of Page & Bacon was composed of all the defendants except Dobyns, a demand of payment on Page alone is not sufficient to make Dobyns liable, but there should have been a demand upon all the members of the firm. The note was made payable at the office of Page & Bacon, and it is well settled that where a promissory note is made payable at a particular place, it will be sufficient for the holder, in order to charge the endorser, to present the same for payment at the specified place; and he is under no obligation, in case of its dishonor at that place, to present it for payment elsewhere, or *personally* to the maker. (Story on Prom. Notes, § 234.) The maker, by making it payable at that particular place, impliedly dispenses with the necessity of making any demand upon him either personally or elsewhere, and this doctrine applies as well to the case of the endorsers, as of the maker, of the note; for the endorsers equally with the maker, in such case, impliedly agree that presentment at the place shall be sufficient to bind all the parties. (Ib.)

The judgment is affirmed; Judge Scott concurring. Judge Napton absent.

HICKMAN *et al.*, Appellants, v. WOOD'S EXECUTOR, Respondent.

1. A. became possessed and took charge of two slaves and a certain amount of money as a trust fund for the benefit of his sister; he appropriated the money and the proceeds of the sales of the negroes to the purchase of a tract of land in this state, and in removing his sister and her family from Kentucky to this state; this purchase was made in good faith, and the property was subsequently conveyed to the sister and her children in satisfaction of the trust, and was occupied by them until the death of the mother. and was afterwards divided by proceedings in partition among her heirs, *Held*, in a suit instituted many years after the date of the original transaction, that there was no claim in equity against A. or his estate growing out of the receipt of the trust fund.

*Appeal from St. Louis Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Buckner*, for appellants.

*Glover & Richardson*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This case was tried under the act of 1849. There was no motion for a review of the facts alleged to have been erroneously found, accompanied with a statement of the evidence upon which they were based. The conclusions of law drawn from the facts as found by the court seem to be unquestionable, and, so far as the bill of exceptions shows, there was no conflict in the testimony.

The facts were, in brief, that the defendant's testator had, many years ago, taken charge of two slaves and some money as a trust fund for the benefit of his sister, the ancestress of the plaintiffs; that he appropriated the money and the proceeds of the sales of the negroes to the purchase of a tract of land in Randolph county, Missouri, and in removing his sister and her family to this county from Kentucky, where both parties originally resided; that the land was subsequently conveyed to his sister and her children, was occupied by

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Ahern v. Carroll.

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them until the death of the mother, and has been divided by a proceeding in partition among the plaintiffs, her heirs. It appears that the investment was made in good faith and was for the benefit of the beneficiaries of the trust.

Under these circumstances, there could be no claim in equity against the defendant's testator or his estate, on the part of the plaintiffs, after the land had been received in satisfaction of the trust and disposed of.

Judgment affirmed. The other judges concur.

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AHERN, Respondent, v. CARROLL *et al.*, Appellants.

1. Justices of the peace have no jurisdiction of actions for torts—as for unlawfully taking and detaining personal property—where the damages claimed amount to ninety dollars.

*Appeal from St. Louis Law Commissioner's Court.*

C. C. McClure, for appellant.

I. The justice of the peace had no jurisdiction.

EWING, Judge, delivered the opinion of the court.

This was a suit before a justice of the peace on the following statement: "Andrew Carroll and John Carroll, to Jeremiah Ahern, Dr. 1854, July. To value of horse belonging to me and unlawfully taken and detained, and which you have failed to return, \$90." At the trial a motion was made to dismiss the trial for want of jurisdiction, which was overruled, and a trial being had judgment was given for the plaintiff for seventy-five dollars, from which the defendants appealed to the law commissioner's court. Here, a similar motion to dismiss being overruled, upon a trial by the court plaintiff again had judgment.

The only question is as to the jurisdiction of the justice of the peace. The statute gives jurisdiction to justices of the

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Mead v. Brotherton.

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peace over actions for injuries to persons, or to real or personal property, wherever the damages claimed shall not exceed twenty dollars, and concurrent jurisdiction with circuit courts for injuries to persons or to personal or real property, wherein the damages claimed shall exceed twenty and not exceed fifty dollars; for the recovery of specific personal property, not exceeding the value of fifty dollars, alleged to be wrongfully detained, and damages for injuries thereto, or for the taking and detention, or detention thereof, not exceeding twenty-five dollars. (R. C. 1855, p. 925.) This being an action for a *tort*, and the amount claimed being ninety dollars, it is obvious the justice had no jurisdiction. It is immaterial that damages were not claimed, *eo nomine*, the cause of action being an unlawful taking and detention of the property.

Judgment reversed; the other judges concurring.



MEAD *et al.*, Respondents, v. BROTHERTON, Appellant.

1. Instructions are calculated to mislead and are erroneous which place the case before the jury upon a portion of the facts only, and which, in effect, restrict the issue, and exclude from the consideration of the jury questions that must be passed upon.

*Appeal from St. Louis Court of Common Pleas.*

Cline & Jamison, for appellant.

S. H. Gardner, for respondents.

EWING, Judge, delivered the opinion of the court.

This was an action to recover the sum of four hundred dollars, alleged to be due for a gold watch sold to the appellant. The only question arising upon the pleadings and evidence in the cause was whether the witness, one C. H. Pond, who purchased the watch in question, bought it on his own

account and upon his own credit, or as the agent of, and upon the credit of, appellant.

Several instructions were asked by the appellant, all of which were refused, and properly so, we think, because the three first especially present the single hypothesis of an agreement between the appellant and Pond, which, if found by the jury, exonerated the appellant from liability, although such agreement may not have been brought to the knowledge of the respondents, and, by thus restricting the issue, excluded from the consideration of the jury the question whether Pond, in purchasing the watch, acted as the appellant's agent and bought it on his credit.

The other instructions, four and five, were also erroneous; for if the contract for the watch was made by the respondents, plaintiffs below, with Pond as the agent of the appellant, and the credit was given to the latter, still it was a contract with the appellant by which he was bound; yet, under these instructions, the jury were not at liberty so to view the transaction.

The law applicable to the case upon the evidence was presented to the jury in the instructions given by the court.

The judgment will be affirmed; Judge Scott concurring. Judge Napton absent.



MAGWIRE, Appellant, v. TYLER *et al.*, Respondents.

1. In the case of a confirmation under the act of Congress of March 3, 1807, where the confirmation is accompanied with the condition that the land confirmed should be surveyed, such survey, when made by the proper executive officers of the United States government, conclusively settles the question of the locality of the tract confirmed, and the courts of equity as well as law can not locate the tract elsewhere.

*Appeal from St. Louis Land Court.*

This case has heretofore been before the supreme court. The decision of the court is reported in 25 Mo. 484. The

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facts of the case as bearing upon the decision of the court are sufficiently set forth in the said report in 25 Mo. 484. It is deemed unnecessary to set them forth again.

*Krum & Harding, Glover & Richardson, and L. V. Boggy,*  
for appellant.

I. The motion for a review of the finding of the court presents the material questions involved in this case. Among the facts found, which are material and are not objected to by the plaintiff, are the following: That in 1794 the Spanish government granted four by twenty arpens of land to Joseph Brazeau, as stated and claimed in plaintiff's petition; that Brazeau took possession of the land so granted to him about the time of said grant; that Brazeau, in 1798, sold to Labeaume said four by twenty arpens, excepting four by four arpens in the south-east part, which the said Brazeau reserved, as claimed in the petition; that said four by four arpens were confirmed to said Brazeau in 1810 to be surveyed; that said four by four arpens confirmed as aforesaid to Brazeau were surveyed in 1817, which survey was duly returned and approved; that the plaintiff has acquired the title to said four by four arpens by regular mesne conveyances under Brazeau; that when the patent was issued to Labeaume's representatives, they had notice of plaintiff's claim to the land reserved by said Brazeau in his deed to Labeaume. The plaintiff in his motion for a review asked the court to find, among other facts, the following: That the survey made in 1817 of the land confirmed to Labeaume was so made by the surveyor as to include the four by four arpens confirmed to Brazeau; that the said four by four arpens, confirmed and surveyed as aforesaid, are situate north of Labeaume's "south ditch," and are a part of the four by twenty arpens conceded to Brazeau in 1794 by the Spanish government; that the said four by four arpens confirmed to Brazeau are included within the description or outboundaries of the land mentioned in the patent issued to Labeaume's representatives; that the defendants claim and are possessed of the said four by four

arpens; and that they so claim and possess under and in virtue of said patent to Labeaume's representatives. The evidence also proved that the patent issued to Brazeau's representatives in 1852 was recalled or cancelled before the trial in this case. If these facts had been included in the finding the plaintiff would have been entitled to the relief and judgment prayed for in his petition. The court erred in refusing to find them. The evidence abundantly proved them.

II. The *legal* title must be admitted to be in Louis Labeaume or his legal representatives. The *equitable* or claim of the representatives of Brazeau followed the land in the hands of the present claimants under the patent to Labeaume. The tract of three hundred and seventy-four arpens conceded to Labeaume and surveyed by Soulard under authority of the Spanish government included the four by twenty arpens, as well that portion reserved by Brazeau as that he conveyed to Labeaume. The United States surveys made in 1817 of the confirmations respectively of three hundred and fifty-six arpens to Labeaume and sixteen arpens to Brazeau, severed the whole from the public domain and located the land in both confirmations. The confirmations having been thus located and severed from the public domain by the authorized act of the government of the United States, the rights of said confirmees respectively attached to the land, each to his own share or portion from the date of the return of the official survey; and said rights were according to said confirmations and surveys. The government of the United States from the time of the survey in 1817 had no longer any control in respect to the location of the land embraced in said confirmations, and it belonged to the judicial and not to the executive department of the government to settle conflicts between the confirmees or their legal representatives. The rights of Brazeau or his legal representatives became fixed by the confirmation in his favor, and the right became definite and certain in the matter of the location of the land when the survey was made in 1817. That the patent issued to Labeaume included all the land

embraced in the confirmations to him and Brazeau does not have the effect to defeat the equities of the latter. The patentee holds in trust for the owners of the equitable interest. (2 Johns. Ch. 405; 9 Cranch, 164; 11 How. 567; 7 Mo. 610.) Brazeau was entitled to sixteen arpens within the extended grant to Labeaume. This is apparent on the face of the act of confirmation itself. From the survey in 1817 of the "two tracts in one," plats of the respective tracts could have been constructed, and patent certificates to the respective confirmees could have been made out and patents issued. By the survey in 1817, the confirmation to Brazeau attached to the land so surveyed. (West v. Cochran, 17 How. 415; Carondelet v. McPherson, 20 Mo. 203.)

III. Neither the Secretary of the Interior, nor any other officer of the executive department of the government, had any right—after the survey of 1817 was returned and recorded—to determine the rights of the claimants. That right belongs to the judiciary. The survey or retracing of the lines, made by order of the Secretary of the Interior in 1852, can not affect either party unless assented to, and this Brazeau's representatives refused to do. (20 Mo. 205.)

IV. The plaintiff is not barred by laches; nor is this a stale demand. From the year 1823 there have been continued efforts on the part of Brazeau's representatives to recover the land in controversy. It was not till 1852 that Labeaume's representatives got the patent in question. The patent was obtained in the very midst of this controversy. Labeaume's representatives hold the legal title in trust for Brazeau's representatives.

V. The court finds that the four by four arpens confirmed to Brazeau are situate south of Labeaume's south ditch, and that said ditch, at the time of Soulard's survey in 1803, was recognized by all the proprietors as Labeaume's south line, and that possession was claimed and held with such recognition from the time of said survey in 1803 until 1823. The evidence does not warrant the finding of these facts. This south ditch of Labeaume was his south line for a part of his

concession, but not the whole distance along the south of his concession. Brazeau either had no land confirmed to him, or that which was confirmed is a part of the original concession of four by twenty arpens conceded. The whole of this was north of the ditch.

*B. A. Hill and Shepley, for respondents.*

I. The case as now presented raises the same questions discussed and decided when the case was here before. (See 25 Mo. 484.) The confirmation to Brazeau was void, no notice having been filed by him or his vendee Chouteau. If the claim be not void for want of notice, yet it can not operate as a grant of the premises in controversy by force of the acts of 1805 and 1807. Brazeau had no estate or claim, and no possession. (Gilb. Ten. 75 ; 2 Co. Inst. 516, 295.) The confirmation to Labeaume is express, and he had the possession to support it. The estate of the confirmer Labeaume originated under the act of 1805. He had a warrant or order of survey, and a survey by Soulard in 1799 of the identical premises included within the Labeaume patent. He was the head of a family and in actual possession in October, 1800, and December 20, 1803. The survey under the Spanish law was the authentic act upon which the grant was made, and proves itself as a record. The commissioners of the United States had no power to make a new survey of the Labeaume tract after confirmation. The Soulard survey had been filed with the proper register and recorder, and appeared of record on the public archives of said territory of Louisiana. The commissioners had the power to direct a *resurvey*, and in such case the lines of Soulard's survey should have been retraced. This order of survey must be regarded as an order of resurvey. The government of the United States, in 1852, made the resurvey pursuant to the act of Congress of 1807, and the patent issued thereon. The Spanish survey of Soulard was conclusive as soon as the confirmation was made, and the Labeaume tract was located thereby. (Ott v. Soulard, 9 Mo. 588.) The surveys of 1817, 1833 and 1837, by

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the surveyors general of the United States, of the Labeaume tract, were not authorized by the act of Congress under which the confirmation was made, and were void. Each of these surveys has, moreover, been disapproved by the executive department of the government. (See *West v. Cochran*, 17 How. 403.) The cases of *West v. Cochran* and *Staniford v. Taylor* do not hold that a confirmation under the act of 1807, upon an authenticated plat of survey filed with the recorder and appearing of record, is not effectual to vest the title in the confirmer. The scope of these decisions is limited to unsurveyed and unlocated claims. Brazeau's grant was unauthorized, for the lieutenant governor of Louisiana had no power to grant lands. There was no definite location of Brazeau's grant. There was no Spanish, French or American survey of it at the time of the confirmation; not even a figurative plat of it filed of record. The confirmation carried with it the condition of survey. (*West v. Cochran*, 17 How. 403; *Staniford v. Taylor*, 18 How. 512). Plaintiff, as representative of Brazeau, has no title to any land outside of the United States survey under the confirmation. The claim to an equity to claim a location within the Soulard survey confirmed and retraced by the United States and patented to Labeaume's representatives is expressly repudiated by the majority of the court in the case of *West v. Cochran*, and *Staniford v. Taylor*, 18 How. 512.

II. It is not true that the confirmations to Labeaume and Brazeau are to two persons for the same land. The confirmation to Brazeau must be located according to the reservation in the deed of May 9, 1798, if it can be located at all by evidence *dehors* the United States survey. The evidence clearly shows that the Brazeau reservation was south of Labeaume's south ditch. How can a court of equity decree, after sixty years' possession, by a common boundary line, that the Brazeau reservation is to be located at a different place from that described in the deeds under which the respective proprietors on the north and south claim title? If there could be any doubt in regard to this question, will the court, after this lapse of time, disturb innocent purchasers

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for a valuable consideration, when the property has increased in value from forty dollars to five hundred thousand dollars. Plaintiff's equitable claim arose, if at all, fifty years ago. Soulard's survey did not include the reservation, and the court has so found. There is no doubt of the correctness of the finding. The plaintiff sold to L. V. Bogy the whole of the Brazeau reservation south of the Soulard survey for Labeaume, and if he can persuade this court to relocate the same reservation within the Soulard survey, the representatives of Brazeau will obtain thirty-two arpens of land under a confirmation for four arpens made by the board, in direct violation of law, to a man who was not a claimant and had no interest. The survey by the United States located the land, and there is not even a plausible excuse for claiming a relocation. (*West v. Cochran*, 17 How. 403.) See report of argument for respondent when the case was on appeal before.

NAPTON, Judge, delivered the opinion of the court.

This case presents substantially the same questions that were before the court when it was here before. (25 Mo. 484.) Upon the last trial, in the land court, all the evidence was submitted, and there was a finding by the court of the facts; but upon this finding the same questions arise as did upon the demurrer to the bill.

It is unnecessary to repeat what I said when the case was here before. Upon the propriety of the location of the Brazeau reservation by survey under the Secretary of the Interior in 1852, I give no opinion. I consider the case as decided by the case of *Cochran v. West*; and if it should turn out that I am mistaken in the construction given to this and other decisions of the supreme court of the United States, I prefer leaving to that court an examination into the question of location which will arise in the event that these decisions have been misunderstood.

It has been suggested that the survey of Brown of two tracts in one may be treated as the authoritative government survey, and if so, that there is nothing in the principle deter-

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mined in Cochran v. West to prevent a correction of the last survey which located the Brazeau reservation outside of the Labeaume concession and south of the ditch. But it will be observed that all these surveys—Soulard's, Brown's, and the survey under the directions of Secretary Stuart—were all before the court in the case referred to, and the last was regarded by the court as the authoritative survey.

Upon this ground alone of *res adjudicata*, I am for affirming the judgment of the land court.

Judge Ewing concurs in this opinion.

SCOTT, Judge. P. Chouteau owned two parcels of land north of St. Louis. One of these tracts was supposed to be immediately north of and adjoining the other. On the first of June, 1826, Chouteau conveyed to G. F. Strother these tracts of land by the following descriptions: "All that tract or parcel of land granted to the said Pierre Chouteau in October, 1797, by Charles Dehault Delassus, Spanish commandant, beginning at Roy's line, running north to Labeaume's south line, and extending from the river to the common fields west, it being intended hereby to convey to the said G. F. Strother, his heirs and assigns, all the land contained within the said concession, except that heretofore sold by the said Pierre Chouteau according to his said several contracts, to be limited by the metes and bounds limited and fixed by the intention of the parties at the period of contracting. And one other tract of land containing four arpens, running on the river, and running back four arpens, making sixteen arpens, lying between the north line of the first described tract of land and the south boundary of the tract of land sold by Joseph Brazeau to Labeaume; said sixteen arpens being a tract or parcel of land confirmed to Joseph Brazeau, and sold and conveyed by Joseph Brazeau to Pierre Chouteau." The exceptions in the granting part of the deed in relation to the first tract described have no influence in this controversy, as they all lie south of the land in dispute.

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On the 3d of September, 1830, Strother, by a deed containing an exception not affecting this controversy, conveyed the tracts of land he purchased from Chouteau to John O'Fallon and John Mullanphy, in trust for the St. Louis Marine Railway Company. With the exception above stated, this deed professed to convey to the said trustees the same tracts, pieces or parcels of land which the said G. F. Strother purchased from Pierre Chouteau by the deed above mentioned, and the description of the tracts in the two deeds correspond in substance if not in words.

On the 31st of January, 1851, the St. Louis Marine Railway Company passed the following resolutions: "1st. That the land belonging to or claimed by the St. Louis Marine Railway Company in the city of St. Louis, and north of what is known as Labeaume's ditch, being four arpens in front on the river, and four arpens in depth, and bounded on the east by the Mississippi river, and south by said ditch of Labeaume, and containing sixteen arpens, be conveyed to John Magwire, and that J. O'Fallon, surviving trustee, who holds the legal title to the said land, be and he is hereby directed to make said conveyance to said Magwire and deliver the same. 2d. That, on receiving the deed on the last resolution mentioned, said John Magwire execute and deliver to the stockholders of said company an agreement to commence suits or other proceedings, without delay and at his own expense, for the recovery of the land to be conveyed to him, and on recovering the same, or any part thereof, to convey to each stockholder such portion of said land as shall be equal to one-fourth of what is represented by the stock such stockholders may hold at the time of said recovery." Magwire entered into an agreement in pursuance to this resolution, and on the 2d of January, 1852, John O'Fallon executed to him a deed in which the land is described as set forth in the foregoing resolutions. Thus it appears that the St. Louis Marine Railway Company has employed the plaintiff to prosecute this suit for the company, and the plaintiff can not be viewed in a more favorable light than the company itself.

Now the concession to Chouteau, as surveyed by the United States, which is the first tract mentioned in the deed from him to Strother, did not extend so far north as it was made to extend by the Spanish survey made for Chouteau under his concession. The Spanish surveyor bounds this concession on the north by the land of Labeaume, and on the figurative plat accompanying the survey there is marked a ditch as the northern boundary of the survey.

Brazeau originally, under the Spanish government, owned the land which is described above as Labeaume's. He sold it to Labeaume, and after Labeaume purchased from Brazeau he obtained from the Spanish government an extension of the limits of the land he so purchased. Brazeau, in making a sale to Labeaume, reserved to himself four arpens of land to be taken at the foot of the hillock in the southern part of said tract. This hillock is some distance below the ditch marked as the northern boundary of the Spanish survey of Chouteau's concession by Delassus. The space between a line from the foot of the hillock and the ditch would contain some eighteen and a half arpens. This hillock, in the earliest Spanish documents concerning Brazeau and Labeaume's concessions, transfers and reservations, is called the *grange de terre*. It is a noted object, the locality of which admitted of no uncertainty or dispute. In July, 1816, Brazeau conveyed to Pierre Chouteau the reservation of four by four arpens in pursuance, as it is alleged in the deed, to a previous sale. This deed describes the tract of four by four as situated in the south part of the concession to Brazeau which he conveyed to Labeaume. These facts are narrated not with a view to locate the four by four tract reserved by Brazeau and by him sold to P. Chouteau, who conveyed to Strother and who conveyed to the trustees of the St. Louis Marine Railway Company. They are stated to show that there was a ground for dispute as to the fact whether the four by four tract should be located north or south of the ditch.

The government of the United States surveyed and located the four by four tract immediately south of the ditch of

Labeaume, and on the 25th of March, 1852, issued a patent therefor to Joseph Brazeau or his legal representatives. The plaintiff John Magwire, claiming to be the representative of Brazeau, refused to receive this patent because it did not properly locate the four by four tract, placing it south instead of north of Labeaume's ditch, and during the pendency of this suit the patent was recalled.

In 1856 the patent for the four by four was demanded of the recorder of land titles by Louis G. Picot, trustee of Ann Biddle, who was an original stockholder in the Marine Railway Company, and to whom the said company had conveyed two lots in the year 1841, which lots are situated within the boundaries of the patent to Joseph Brazeau. This demand was made by Picot as a representative of Joseph Brazeau.

Under these circumstances, how does the Marine Railway Company or its agent Magwire claim to be the exclusive representative of Brazeau? Is not Picot a representative of Brazeau, having a prior right to Magwire? Can Magwire, as agent, claiming as agent of the Marine Railway Company, have rights superior to those who claim by a prior title from that company? Can Magwire insist that, as representative of Brazeau, he is entitled to the land north of the ditch, and thus exclude those who are prior in right to him, claiming to be the same representative? Magwire only claims the land north of the ditch. Now if Picot, as representative of Brazeau, is entitled to the land by a prior title from the Marine Railway Company, whether it is north or south of the ditch, can there be any equity in the subsequent claim of Magwire? If the government of the United States had a right to locate the four by four; if that location has been made and a patent issued to Joseph Brazeau or his legal representatives; if Picot, claiming to be the representative of Brazeau, is willing to take the land as located by the United States, on what ground shall Magwire, the agent of the Marine Railway Company, prevent this after the company has made Picot such representative. The company can not have land both north and south of the ditch. If it has placed

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Picot south, and the government has given him a patent where the company has located him, what right has that company, through its agent, the plaintiff, to deny him the benefit of that patent, and, by seeking for a location of the land elsewhere, violate its faith and obligations to him.

These doubts and difficulties suggest themselves to my mind in considering this case. I can not see how the company, or its agent Magwire, can have any equity in this case whilst there is a prior appropriation of the four by four south of the ditch to its alienee. Picot is not before the court. His claim under the patent has not yet been presented to us. Whether he has any claim under the patent; whether the officers of the government could appropriate the land to the satisfaction of the four by four claim; what has been the effect of recalling the patent; whether that act does divest any right previously vested in him; whether Magwire by refusing the patent could affect his rights, are all questions not presented by the record, and nothing will be said in relation to them, but it seems to me will have to be determined before we can ascertain whether there is any equity in Magwire suing for the Marine Railway Company.

If the title to the four by four located north of the ditch was in the Marine Railway Company, and if it had previously sold and appropriated that tract south of the ditch, and had afterwards defeated the right of her alienee, I do not see why she would not be compelled to hold such title in trust for those who were wronged.

I must know what the company has done with the land south of the ditch before I can say that there is any equity in Magwire. This is not the former action of ejectment in which the mere legal title is involved, but it is a bill in chancery, and the equity of the party must appear.

I do not see that the claim of the plaintiff is strengthened by his deed from Hamilton, the administrator of Strother. It appears to me that that deed was ineffectual, as Strother in his lifetime had conveyed away all his interest in the four by four tract.

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When this case was here before, I expressed the opinion, founded on a fact which I supposed I was warranted in assuming by the consent of the plaintiff's counsel, that there was no equity in the bill. Was I in error in supposing that I was warranted in making that assumption? Yet the case, as now presented, furnishes ground, as I conceive, for the same opinion. As the case has been tried again since then, and as the same difficulty existed in the way of recovery on the part of the plaintiff and he did not see proper to obviate it, but insisted on his equity as his bill was framed, I am in favor of an affirmance of the judgment, believing that, under the circumstances, it would be unwarrantable to keep the defendants longer before the court.

The judgment must be affirmed, in my opinion. The other judges concur in affirming the judgment.

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MULLIGAN, Respondent, v. MEAD, Appellant.

1. Judgment affirmed.

*Appeal from St. Louis Land Court.*

*Gibson*, for appellant.

*A. J. P. Garesché*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

We do not see how the defendant could object to the instructions in this case. The law was laid in as favorable a manner as possible for the defendant and substantially as it was asked, except that the instruction, which would restrict the recovery of interest to five years, was refused. Such a restriction as this might, in certain conceivable cases, produce the grossest injustice, though there is no evidence preserved to show how it would have operated in the present case. We think the instructions given were right. The other judges concurring, the judgment of the land court is affirmed.

BOURGOIN, Respondent, v. WHEATON *et al.*, Appellants.

1. Where in an attachment suit the defendant files a plea in the nature of a plea in abatement putting in issue the truth of the facts alleged in the plaintiff's affidavit, and the issue raised by this plea is found for the plaintiff, the defendant should be allowed time, if he ask it, without terms, to file an answer in bar of the action.

*Appeal from St. Louis Court of Common Pleas.*

A. M. & S. H. Gardner, for appellants.

I. The defendants should have been permitted to file an answer after the verdict on the plea in abatement. This was the earliest opportunity defendants had of filing an answer. Had they filed it sooner it would have been a waiver of the plea in abatement. They should have been allowed the usual time. They had interposed no unusual plea, nor caused any unnecessary delay. It was impossible to comply with the terms imposed.

SCOTT, Judge, delivered the opinion of the court.

This was a suit commenced by attachment. The truth of the fact on which the attachment was founded was put in issue by a plea in the nature of an abatement. This issue was found for the plaintiff. Thereupon the defendants asked leave of the court to file a plea to the merits, which the court refused except said defendants would first file an affidavit of merits *instanter*. The defendants then asked for time to prepare the said affidavit, which the court refused, and thereupon entered final judgment against them.

It has been repeatedly held by this court that a defendant, by pleading to the merits in a suit by attachment, waives the benefit of any plea in the nature of an abatement he may have previously filed; that the two pleas can not be filed at the same time without producing the same result. (*Fugate v. Glascock*, 7 Mo. 577; *Hatry v. Shuman*, 13 Mo. 547; *Cannon v. McManus*, 17 Mo. 345.) As the effect of filing

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a plea to the merits would have been a waiver of the matter in abatement, the defendants certainly should have been allowed time to file a plea in bar of the action after the dilatory plea was disposed of. The law imposes no terms on the exercise of this right, and the court had no authority to exact them.

The judgment is reversed and the cause remanded. The other judges concur.

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DOZIER, Respondent, v. JERMAN, Appellant.

1. Though amendments should be liberally allowed in furtherance of justice, yet the discretion of the inferior courts will not be controlled by the supreme court unless it has been manifestly abused.
2. Where a defendant prays the court on the trial to be allowed to amend his answer, and the court refuses to grant the motion, but allows the defendant to introduce evidence in support of the issue raised by the proposed amendment, and fully submits said issue to the jury by the instructions given, the discretion of the court in the allowance of amendments is not abused.
3. A party wishing to avail himself of error in the giving or refusing of instructions must take his exception at the time they are given or refused; it is too late to make his objections for the first time on a motion for a new trial.
4. It is discretionary with the courts to relax the rules of evidence as to the order of examining witnesses or introducing testimony; material testimony should not be excluded because offered after the testimony is closed, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it.
5. Wherever the jury is authorized, in a case of unliquidated damages, to allow interest in estimating the damages, the interest is not recoverable as such in addition to the damages assessed by the jury, but must enter into the estimate made by the jury and be found as a part of the damages assessed.

*Appeal from St. Louis Court of Common Pleas.*

This was an action to recover damages for an alleged wrongful sale, by the direction of the defendant, of certain real estate belonging to the plaintiff, and conveyed by him to a trustee to secure a certain note for \$2,140 executed by the plaintiff and held by the defendant. The plaintiff sets forth

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in his petition that when the note became due he was unable to pay it, and entered into an agreement with the defendant, through the agent of the latter, for an extension of six months; that in violation of this agreement, although a portion of the consideration therefor was paid and all of it offered to be paid, defendant directed the trustee to make sale of the property; that sale was accordingly made, while the plaintiff was absent dangerously ill, at a great sacrifice. The facts in evidence, so far as they bear on the questions decided by the court, are sufficiently set forth in the opinion of the court.

*McClellan, Moody & Hillyer*, for appellant.

I. The court erred in refusing the amendment asked. The matters embraced in it constituted a defence. The verdict returned by the jury was either void for uncertainty, or it was good for the principal amount stated, and the item of interest should have been treated as surplusage. The court erred in computing the interest. The court had no right to determine what "sale" the jury intended, or its date. Jury could not give interest as such. As to the power of the court to amend a verdict, see 3 Brev. 113; 8 Ired. 528; 1 H. Bl. 79; 1 Mass. 153; 6 N. H. 518; 4 Call, 522; 3 Yerg. 327; 1 Monr. 52; 3 Comst. 327; 12 Ill. 61; 2 Greene, 191; 19 Mo. 239; 2 Maine, 37. The court also erred in giving and refusing instructions. The agreement between Dozier and Jefferson Jermain, the alleged agent of defendant, was usurious; it was therefore binding on neither party. (5 H. & Jo. 193; 17 Mass. 258; 13 Pick. 518; 7 N. H. 326; 5 Mass. 395; 4 N. H. 285; 4 Dall. 298, 308; 6 Binn. 321; 4 S. & R. 159; 2 id. 159; 14 Johns. 146; 5 Day, 452; 8 Johns. 304; 4 Rawle, 185; 2 Shepl. 404; 14 Mass. 322; 15 Mass. 39; 1 Binn. 118; 4 Halst. 352; 7 Mo. 585.) The court erred in permitting Alton Long to testify after the plaintiff and defendant had both rested.

*S. T. & A. D. Glover*, for respondent.

I. The proposed amendment on the trial was properly refused. The court committed no error in giving or refusing instructions. The evidence fully sustained the verdict.

EWING, Judge, delivered the opinion of the court.

During the progress of the trial the defendant offered to amend the answer (it having been already once amended on the trial) by alleging the existence of certain encumbrances on the land in question; that the plaintiff was the owner in fee of but an undivided half thereof, and that he failed to make known said encumbrances to the defendant pending the negotiation for an extension on the note. The amendment being refused, exceptions were taken, and this ruling of the court is one of the errors assigned. It might be sufficient to say, on this point, that the conceded discretion of the courts in the matter of amendments on the trial, even though the proposed amendment may have contained matters of defence to the action, was not, in our opinion, wrongly exercised in this instance, and does not call for our interference. The spirit of our code, it is true, favors a liberal practice in this respect, and amendments should be encouraged in furtherance of justice, but the discretion of inferior courts will not be controlled by this court unless it appears to have been manifestly abused. Moreover, the first amendment embraced substantially the matters set up in the one refused as to the encumbrances; and the only additional allegations related to the plaintiff's knowledge of them at the time of the negotiation respecting the note, his failure to communicate them to the defendant, and that he was the owner in fee of but one-half of the land. These facts defendant relies upon as a defence to the action, and he alleges that they gave him the right to repudiate the contract, or exonerated him from any obligation to accept it. But notwithstanding the amendment was refused, it seems that the defendant had the benefit of it on the trial, and in the instructions of the court, as fully as if it had been formally incorporated into his answer, and thus made a part of his defence; for it appears from the bill of exceptions that the facts alleged in the proposed amendment were disclosed in the testimony of witnesses, particularly that of Mr. McClelland, and that they were allowed to go before the jury without objection. The most

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material of these facts consisted of the agreement in writing between the plaintiff and one Watkins, bearing date July, 1854, by which it appears that they were the joint purchasers of the land from Mitchell; that plaintiff was the owner of but one undivided half thereof, and that in consideration of the sale of Watkins to Dozier of one-half (his interest) of the property, Dozier assumed the total liability to Mitchell for the purchase money, and also became liable to Watkins for additional sums on other accounts; also sundry judgments against the plaintiff for various sums, which appear to have been unsatisfied at the date of the transaction which gave rise to this suit.

Again, the issue, which is raised by the proposed amendment, was not only thus really presented to the jury in the evidence alluded to, but was distinctly submitted to them in an instruction asked by the defendant and given by the court. That instruction is as follows: "That if the jury believe from the evidence that an agreement was made between plaintiff and defendant for an extension of the loan mentioned in the plaintiff's petition, and that by the terms of said agreement plaintiff was to execute a new deed of trust on the land, and that the agent of plaintiff, in negotiating for the new deed of trust, represented to defendant or defendant's agent that the title to the land was clear; and if the jury further believe from the evidence that at that time plaintiff had a fee simple title to only one-half of the land, and a bond for the title to the other half, which bond was subject to conditions involving matters of unsettled account, and there were judgments and other liens upon said land, then defendant, on being informed of these facts, had a right to repudiate such contract and to decline accepting the new deed of trust."

The jury having thus passed upon the questions embraced in the amendment offered, nothing was lost to the defendant by overruling the motion to amend, and he has no cause of complaint by reason of the ruling of the court in this respect.

It appears that no exceptions were taken to the giving or

refusing of instructions, and this relieves us of the necessity of examining them. A party wishing to avail himself of error in giving or refusing instructions must save his exceptions at the time they are given or refused, and it is too late to make his objections for the first time on a motion for a new trial. (*Bompart v. Boyer*, 8 Mo. 234; *id.* 656; 14 *id.* 367.) No point being raised until the motion for a new trial in the court below, the objection can not be entertained in this court. We may remark, however, that the instructions given present the law of the case arising upon the issues and evidence fully to the jury, and of the instructions refused several of them were embraced substantially in those that were given, and the others were erroneous as legal propositions.

The defendant excepted to the ruling of the court in admitting the testimony of Alton Long against his objection. The bill of exceptions, however, shows that the objection was *general*, and this would be a sufficient reason for disregarding it here; for where evidence is objected to, the bill of exceptions must show the specific ground of objection, otherwise it can not be considered in this court. (*Fields v. Hunter*, 8 Mo. 128.) It appears, however, that the witness was introduced after the plaintiff and defendant had rested; and the point made by counsel in their brief is that this evidence was not in rebuttal, and was received out of its proper order. The answer to this is, that the court below is entrusted with a discretion in regard to the relaxation of the rules of evidence as to the order of examining witnesses or introducing testimony; (*Rucker v. Eddings*, 7 Mo. 115;) and there was manifestly no abuse of that discretion in admitting the testimony of Col. Long. Material testimony should not be excluded because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. (*Ib.* 4 Binn. 198.)

An objection is taken to the verdict of the jury, and to the judgment of the court thereon allowing interest on the dam-

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ages found by the jury. The verdict was for "five thousand two hundred and fifty-three dollars, with interest from day of sale." The jury having been discharged, the court, on plaintiff's motion, directed the interest named in the verdict to be computed, and rendered judgment on the verdict, with interest thus computed, for six thousand and fourteen dollars. This was erroneous. The action was one sounding in damages, and the amount of damages was specifically found by the jury; upon which interest, *eo nomine*, was given in addition. Interest is recoverable, as a matter of law, either by reason of an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld; and where it is imposed to punish negligent, tortious or fraudulent conduct, it rests in the pleasure of the jury and is given as damages. (Sedgwick, Dam. 393-405.) The general rule undoubtedly is that interest is not recoverable on unliquidated damages or for an uncertain demand; and whenever it is allowable, as in trover or trespass, for converting or taking goods—in which the measure of damages is in general the value of the property at the time of the taking or conversion, with interest—the interest is not recoverable as such in addition to the damages assessed by the jury, but must enter into their estimate of and be found as a part of the damage itself.

As to the amount of the verdict, although larger than seems to us reasonable from a view of the case as the record presented it, yet it is not so excessive as to authorize us to attribute it to wrong motives in the jury, or suppose it to have been the result of improper influences operating on their minds, more especially as there were two jury trials and the amount of damages in each case was nearly equal.

The judgment will be reversed; but judgment will be entered here for the amount of the verdict, less the interest, namely, five thousand two hundred and fifty-three dollars, and the plaintiff will pay the costs of the appeal.

Judgment accordingly; the other judges concurring.

## FAGAN, Respondent, v. LONG, Appellant.

1. An incoming partner is not liable for debts contracted before he enters the partnership; nor can his co-partner render him liable for such previously contracted debts by giving a note therefor in the partnership name. The incoming partner may, by his agreement, become liable for such debts, and the new firm may, with the consent of the creditors, novate such debts.
2. A party to a suit is entitled to examine as a witness any of the adverse parties thereto. (R. C. 1855, p. 1577, § 3.)
3. Where one of two defendants does not join in an appeal from a justice of the peace, the appellate court may, on proper motion, order a severance.

*Appeal from St. Louis Law Commissioner's Court.*

This was a suit originally instituted before a justice of the peace against Francis Shields and Patrick Long on the following promissory note: "\$105. August 25, 1857. Due to Thomas Fagan, or order, one hundred and five dollars, for value received, on section seventeen of south-west branch of the Pacific Railroad, negotiable and payable without defalcation or discount. [Signed] F. Shields & Co."

The plaintiff obtained judgment before the justice, and the defendant Long appealed. On the trial in the law commissioner's court a severance was had as to the defendants on the ground that the defendant Shields did not join in the appeal from the judgment of the justice, and Shields was introduced as a witness in behalf of the plaintiff against the objection of defendant Long. It appeared in evidence that about the date of the above note Long became a partner of Shields in the grading of section seventeen on the south-west branch of the Pacific Railroad. Long purchased the interest of one Michael Dempsey, who was previous to that time a partner of Shields. The note was given for an indebtedness incurred by Shields and Dempsey. There was evidence introduced with a view to show that Shields and Long were to pay the debts incurred in the grading of said section seventeen by Shields and Dempsey.

The cause was tried by the court without a jury. The court, at the instance of the plaintiff, gave the following in-

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structions or declarations of law: "1. If the jury find that the defendant Shields and Michael Dempsey were partners in business, and as such became indebted to the plaintiff for the amount for which the note sued upon was given, and that before said note was given the defendant Long purchased the interest of said Dempsey in the firm, and was a partner of the defendant Shields at the time the note was executed, and that said note was signed as the note of the firm of Shields and Long, then the defendant Shields, in the making of the note, is to be considered the agent of the new firm and his act is binding upon the partners therein, and the plaintiff is entitled to recover. 2. If the jury find that the defendant Long, after the purchase by him of the interest in said firm, paid off the liabilities of the former copartnership, that he received the benefit of its contracts, or in other respects directly or impliedly [assumed] its obligations, then these are facts from which the jury may infer an understanding between the parties that Long was to be held liable for the debts of Shields and Dempsey. 3. If the jury find that Long purchased the interest of Dempsey in the firm of Shields and Dempsey, then, without proof of any other or further agreement, he became entitled to its credits and became liable for its obligations. 4. If the testimony shows that Long became the partner of Shields by his purchase of Dempsey's share, and that there was a possibility of profit accruing to Long therefrom, then he is liable with Shields for the amount of the note sued for, providing he got the benefit accruing from the consideration thereof."

The court gave the following instructions at the instance of defendant: "1. If the evidence shows that the note sued on was given for a debt contracted and due by Shields, prior to the formation of the partnership, without the concurrence or authority of defendant Long, said note does not bind said Long, unless he subsequently approved, acknowledged, admitted or promised to pay the same. 2. If it appears from the evidence that the consideration of the note was for money, goods, &c., had and obtained of plaintiff by Francis Shields

prior to the existence of a partnership between Shields and defendant Long, and that said note was executed by said Shields, and without the authority or consent of Long, the plaintiff can not recover. 3. No person is liable as a partner for money borrowed, goods had and received, &c., by his copartner prior to the existence of the partnership, although said goods, money, &c., may have been applied to such purposes as enured to the benefit of said partner, unless said partner so sought to be charged promised to pay the same; such promise may be either expressed or implied. 4. If a promissory note or due bill, executed by a partner in the name of the firm, be for his individual debt, which is known to the payee, it is a fraud upon the other partner and does not bind him."

The court found for the plaintiff, and gave judgment against the defendant Long and the sureties in the appeal bond.

*Farish*, for appellant.

I. The court erred in admitting Shields as a witness. The instructions given for the plaintiff were erroneous and contradictory, and inconsistent with those given for the defendant. The note does not bind Long. (1 East, 48; 6 Munf. 418; 25 Mo. 23; 27 Mo. 403; 8 Mo. 511; 10 Mo. 636; 4 T. R. 720; 10 Wend. 461; 2 Camp. 307; Story on Part. § 153.)

*C. C. Simmons*, for respondent.

Scott, Judge, delivered the opinion of the court.

This judgment must be reversed for the contradictory instructions given by the court.

An incoming partner is not liable for debts contracted before he enters the partnership. For such debts no member of the firm can, by using the partnership style, bind the incoming partner. But an incoming partner may, by his agreement, become liable for such debts; and with the understanding and consent of all parties a note may be given in the partnership name for such debt. The new firm, with the

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consent of the creditor, may novate the debt. (Story on Part. § 152-3.) The instructions given for the plaintiff were erroneous.

The law now allows a party to a suit to examine any adverse party. Shields was an adverse party to the plaintiff, though we can see that he was a willing witness for him. A codefendant, who is primarily liable for the debt claimed, is a competent witness for the plaintiff. (*Bank of Charleston v. Emerie*, 2 Sand. 718.)

As the defendant Shields did not join the appeal, there was a right to sever him. (*Perry v. Block et al.*, 1 Mo. 342.)

Judge Ewing concurring, the judgment is reversed and the cause remanded. Judge Napton absent.



FAGAN, Respondent, v. LONG, Appellant.

1. *Fagan v. Long*, ante, p. 222, affirmed.

*Appeal from St. Louis Law Commissioner's Court.*

*Farish*, for appellant.

*C. C. Simmons*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This case is like that of *Fagan v. Shields and Long*, decided at this term.

Judge Ewing concurring, judgment reversed and cause remanded. Judge Napton absent.



BAKER, Respondent, v. BLOCK *et al.*, Appellants.

1. A party who writes his name on the back of a promissory note of which he is neither payee nor endorsee, is, *prima facie*, a maker of the note, and the payee is entitled to recover against him without proof of demand on the maker and notice of nonpayment. ¶

*Appeal from St. Louis Law Commissioner's Court.*

*Simmons & Woerner*, for appellants.

*Mason & Woodson*, for respondent.

I. There is nothing either in the pleadings or the evidence to explain how the Blocks ever could have sustained the relation of endorsers entitled to have demand of payment of other defendant and notice of nonpayment. They stood, *prima facie*, in the relation of makers of the note. The payee had a right to regard them as personally liable. (Powell v. Thomas, 7 Mo. 440; Lewis v. Harney, 18 Mo. 74; Perry v. Barrett, 18 Mo. 140; Schneider v. Schiffman, 20 Mo. 571.) If the defendants undertake to excuse themselves from this kind of liability, upon them rests the obligation both to plead these facts, and, when pleaded, the burden of proving them. It is an affirmative defence. (18 Mo. 81, 140; 20 Mo. 571.) This the defendants have failed to do. They have failed altogether to prove that they signed as endorsers. The instruction given, on motion of plaintiff, was proper. The instructions asked were properly refused. There was no evidence to sustain them, and they are not law.

Scott, Judge, delivered the opinion of the court.

This was a suit on a note of which the following is a copy :  
"St. Louis, March, 1857. One day after date, I promise to pay to the order of Peter Baker, one hundred and fifty dollars, for value received, negotiable and payable without defalcation or discount. [Signed] H. Haquette." [Endorsed] "L. Block & Bro."

L. & E. Block, whose names were endorsed on the note, were sued as joint makers. An instruction was asked by the defendants Block to the effect, that if the note was given for the debt of Haquette, and L. & E. Block signed the same as endorsers without intending to make themselves original promisors or joint makers thereof, and the transaction at the time was so understood by the parties, then the plaintiff is

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not entitled to recover against the defendants Block without proof of a demand on the maker Haquette, and notice of his nonpayment.

It is well settled law in this state that a party who writes his name on the back of a note of which he is neither payee nor endorsee, in the absence of extrinsic evidence, is to be treated as the maker of the note. (18 Mo. 74.) As there was no jury in the case, the court might well have refused the instruction, as the court was not bound to give the instruction unless in its opinion there was evidence to warrant it. Had the instruction been given, the court might have been committed to find for the defendant, as thereby it would have indirectly declared that there was evidence authorizing such instruction. Where the trial by jury is waived, there is some difficulty in this court's reviewing such instructions, as it can not be seen whether the court below rejected the instruction because it did not contain a legal proposition, or because on the evidence there was no ground for it. If it should be refused on this last ground, this court would not interfere. We can not say that the court below erred in rejecting the defendant's instruction.

Judge Ewing concurring, judgment affirmed. Judge Napton absent.

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FARRELL, Respondent, v. HART, Appellant.

1. Judgment affirmed.

*Appeal from St. Louis Circuit Court.*

*F. C. Sharp and H. N. Hart*, for appellant.

*Burke & Mauro*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note executed by the defendant to plaintiff in consideration of a judg-

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ment rendered in the plaintiff's favor against the Chicago and Mississippi Railroad Company.

The defendant, in his answer, alleges a failure of consideration by reason of refusal of the plaintiff to give him a legal assignment of said judgment, and pleads a set-off for professional services rendered; to which there was a replication denying the indebtedness. There was a judgment for plaintiff for the amount of the note, from which the defendant appealed to this court.

The only questions arise upon the instructions, and being of opinion there was no error in giving or refusing instructions, the judgment will be affirmed; Judge Scott concurring. Judge Napton absent.



LINVILLE *et al.*, Respondents, v. HARRISON, Appellant.

1. Where several causes of action are embraced in the same petition, they should be separately stated.

*Appeal from St. Louis Court of Common Pleas.*

Grover and B. A. Hill, for appellant.

G. P. Strong, for respondents.

SCOTT, Judge, delivered the opinion of the court.

We see no error in the giving or refusing of instructions on the trial of the cause. There was a misjoinder of several causes of action in the second count of the petition. In the same count the party could not complain of taking his property wrongfully by replevin and also prefer a claim for damages for maliciously suing out the replevin. These were several causes of action, and should have been separately stated, if they could have been joined. But the verdict returned by the jury is framed in such a way as shows that the defendant has sustained no injury by this course. It shows that no

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damages were given on account of the malicious suit. Indeed the damages given the plaintiff were for a less sum than the defendant had by his agent sworn the property was worth.

The other judges concurring, the judgment will be affirmed, with ten per cent. damages.

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GARNIER, Respondent, v. LEBEAU *et al.*, Appellants.

1. By the act of February 12, 1857, (Sess. Acts, 1857, p. 181,) "a party may be examined as a witness in behalf of his co-plaintiff or of a co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered.
2. Where a continuance was applied for in behalf of several defendants in a cause on the ground of the absence of a co-defendant alleged to be a material witness in their behalf; *held*, that the motion was properly overruled on the ground that it did not appear but that all the defendants were interested in the defence which the testimony of the said co-defendant was expected to support.

*Appeal from St. Louis Circuit Court.*

This was an action by Louis A. Garnier against A. A. Le Beau, E. O. English, S. Meyerson, J. Burns and J. Johann, on a negotiable promissory note alleged to have been executed by the defendants LeBeau and English, under the name and style of A. A. LeBeau & Co., in favor of Meyerson, and endorsed by him to the defendants, English, Burns and Johann—who were partners under the name and style of English, Burns & Co.—and endorsed by said English, Burns & Co. to the plaintiff.

The defendant Myerson set up in his answer that he procured said note for the plaintiff; that in endorsing the same he acted as agent of plaintiff and for his accommodation; that his endorsement was given without consideration, and with the special understanding that he (Meyerson) was not to be held liable to the plaintiffs by virtue thereof. LeBeau

filed a separate answer, which he afterwards withdrew, and allowed judgment to be entered against him. The defendant Johann put in issue the alleged presentment and notice.

The defendants English and Burns denied that the firm of English, Burns & Co. ever delivered the note in question to the plaintiff, or that due presentment was made or notice given. They allege that plaintiff received the note from Myerson and that no consideration was paid to the firm of English, Burns & Co. either by plaintiff or by Myerson; that the note was made by A. A. LeBeau, under the firm of A. A. LeBeau & Co., for the accommodation of said Myerson; that for the said note plaintiff had taken the note of Gabriel Chouteau and said Myerson, and had given time to the said defendant Myerson, as the said last mentioned note was not due; that when plaintiff took said note of Chouteau and Myerson he knew that Myerson was the real debtor; and that when plaintiff first received it from Myerson he knew it was made for Myerson's use and accommodation. They deny that the defendant English was ever a partner of LeBeau. They claim the benefit of all the collateral security and notes deposited by said Myerson with the plaintiff.

At the trial the defendants English, Burns and Johann moved the court for a continuance of the cause, and in support of this motion filed the affidavit of said Johann. In this affidavit said Johann set forth the absence of LeBeau, the materiality of his testimony, and that there was no other witness in attendance or known to defendants whose testimony could have been procured in time and upon which the defendants could safely rely to prove the particular facts said LeBeau was expected to prove; that defendants could not safely go to trial without his testimony; that he was not absent through consent or connivance, &c. The court overruled the motion.

The court rendered judgment against the defendants.

*Knox & Kellogg*, for appellants.

I. The court should have granted the continuance. This was the return term. The affidavit in all respects fully com-

plied with the statute and rule of court. The note was made and endorsed solely for the accommodation of Myerson. The giving of the note of Myerson and Chouteau was a discharge of the other parties. It was given and received as payment. The plaintiff wholly failed to give the notice of dishonor. English was not a partner of LeBeau.

*H. N. Hart*, for respondent.

I. The ruling of the court on the motion for a continuance was right and proper. The parties had not severed in their defence. The party could not be a witness for the defendants. (R. C. 1855, p. 1577.)

SCOTT, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note. Three of the defendants, who were joint endorsers, made a defence to the action. One of them applied for a continuance on the ground of the absence of A. A. LeBeau, a co-defendant, whom they wished to examine. The application was refused, and this is the main if not the only point made in the cause. The cause was submitted to the court, and no question of law was raised by any instructions. There was an exception taken to the refusal of the court to permit a witness, Myerson, to answer the question, what was the consideration for which LeBeau, the maker, gave him the note, and whether LeBeau and English, Burns & Co. were not accommodation maker and endorsers for him, Myerson. Myerson was a defendant and the first endorser of the note, to whom it was made payable.

The witness, on account of whose absence the continuance was asked, was a co-defendant. By our act concerning witnesses, a plaintiff or defendant has no right to examine his co-plaintiff or his co-defendant for himself. By the act of 12th February, 1857, (Sess. Acts, p. 181,) "a party may be examined as a witness, in behalf of his co-plaintiff or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and

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as to which a separate and not joint verdict or judgment can be rendered." The party applying for a continuance on the ground of the absence of a witness, such as is described in the foregoing provision, should show that he had a defence such as would warrant the examination of the witness. Here it does not appear but that all the defendants wanted their co-defendant as a witness. The party not showing that he had a case in which he was entitled to the evidence of his co-defendant, we can not say that he was injured by the refusal to grant a continuance.

We do not see how the defendants were injured by the refusal of the court to permit the defendant Myerson to testify in relation to the consideration for the note and for its endorsement, as there is nothing showing that the plaintiff was not an innocent holder for value.

The other judges concurring, the judgment affirmed, with ten per cent. damages.

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SCHEIFER, Respondent, v. KAHLMAN *et al.*, Appellants.

1. Where the defence relied upon is a joint defence, upon which all the defendants rely, one defendant can not be permitted, under the act of February 12, 1857, (Sess. Acts, 1857, p. 181,) to testify in behalf of his co-defendants.

*Appeal from St. Louis Court of Common Pleas.*

This was an action by Jacob D. Scheifer against Herman Kahlman, Ferdinand Strange, Frederick Schulenburg, Adolphus Bockler and Francis Saler. There are several causes of action joined in the same petition, all based upon indebtedness incurred by the defendants as partners. The defendants were alleged to be partners in the building of a railroad bridge over the Gasconade river. The defendants Kahlman, Bockler, Saler and Schulenburg filed a joint answer putting in issue the allegations of the petition.

The following is the bill of exceptions in the cause: "Be

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it remembered, that on the trial of the above cause in the said court the following proceedings were had: Defendants Francis Saler, Frederick Schulenburg and Adolphus Bockler, at the time of the calling and before the trial of the cause, on the 24th of March, 1858, applied to the court for a continuance thereof based on the absence of Herman Kahlman, who resides in the city and county of St. Louis, alleged by said defendants to be a material witness for said last mentioned defendants. Said absent witness Kahlman had been duly subpoenaed and in attendance in court heretofore when said cause was first called. Under a general leave to take attachment, an attachment had also been issued for said Kahlman, but had not been returned or served on the absent witness. Plaintiff objected to a continuance on the ground of the absence of said Kahlman for the reason that said Kahlman was a co-defendant with said Saler, Schulenburg and Bockler on the record. Whereupon the court ruled that it could entertain no application for a continuance on said ground, and refused further process for said witness, to which ruling the defendants then and there excepted," &c.

*Krum & Harding* and *Kribben*, for appellants.

I. The court erred in refusing to sustain the motion for a continuance.

*Gantt* and *T. C. Johnson*, for respondent.

I. The court properly refused to grant the motion for a continuance. A co-defendant is not a competent witness for the defence in an action of assumpsit. (R. C. 1855, p. 1577, § 3, 6.) The act of February 12, 1857, (Sess. Acts, 1857, p. 181,) gives no aid to the application of defendants for a continuance on account of the absence of Kahlman, their co-defendant. The only matter as to which he could by possibility have been examined was the partnership. He could not, under the act, have been heard to diminish the debt, but only to disprove the joint liability of defendants with him for it as partners. The answer, however, is joint. The parties did not rely on or set up any defence which was not

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common to them. The defence was joint. No co-defendant can be heard to establish such a defence. (See *Benoist v. Donnelly*, 26 Mo. 589.) Neither the materiality of the witness nor diligence was shown. It does not appear that the court improperly refused process. No case was made for the issue of process of attachment. No compliance with the rules of court is shown, nor any compliance with the statute. (8 Mo. 606.)

SCOTT, Judge, delivered the opinion of the court.

This case comes here for a refusal of a continuance. In this respect it is like the case of *Garnier v. LeBeau et al.*, decided at this term of the court. The judgment will be affirmed, with ten per cent. damages; Judge Ewing concurring.

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RIDER, Plaintiff in Error, v. SPRINGMEYER *et al.*, Defendants in Error.

1. The supreme court will not grant new trials on the ground that the verdicts are against the weight of evidence.

*Error to St. Louis Law Commissioner's Court.*

H. N. Hart, for plaintiff in error.

S. H. Gardner, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

There is no point of law in this case. It stands on the evidence. The court below found that the note sued on was paid and satisfied. There is ample evidence in the record supporting this finding. We do not conceive that the counteracting evidence offered by the plaintiff was so plain and so clear as to induce us to interfere with the finding.

The other judges concurring, the judgment will be affirmed,

EVANS *et al.*, Respondents, v. POND, Appellant.

1. A cause was set for trial on the 6th of May, 1858; on the 5th of May the defendant issued subpoenas for witnesses; these subpoenas were returned by the sheriff "not found;" on the 6th the case was called for trial, but was not tried; on the 7th it was again called, whereupon the defendant filed a motion for a continuance on the ground of the absence of material witnesses, accompanying said motion with an affidavit in which he set forth that when he discovered on the 6th day of May that the subpoenas had been returned "not found," he searched for said witnesses and used his best endeavors to find them and procure their attendance. The court overruled the motion. *Held*, that the motion was properly overruled.

*Appeal from St. Louis Circuit Court.**Krum & Harding*, for appellant.

I. The court improperly overruled the motion. It appeared from the affidavit that the absent witnesses resided in the city of St. Louis, and the subpoena shows that the sheriff had ample time to search for them. He returned them "not found." The inference from the return is that the sheriff knew where to find said witnesses ordinarily; that he searched diligently for them, and that they were not in reach of process. Defendant used his own personal exertions to discover them, and bring them into court. Due diligence was used. The refusal to grant a continuance when good ground therefor is shown is error. (6 Mo. 444.) A palpable case of diligence must, it is true, be shown. (8 Mo. 606.) In this city, one day has, until recently, always been considered sufficient time for service of a subpoena upon a resident witness. Two days' time is now sufficient. Here we show the sheriff's efforts one day, and the defendant's on the next.

*Lackland, Cline and Jamison*, for respondents.

1. The defendant did not use due and proper diligence in obtaining the attendance of witnesses. The granting of the continuance upon the application was discretionary. This court will not interfere, unless there is an abuse of a sound discretion. (See 8 Mo. 606, 334; 18 Mo. 477, 47, 445; 21 Mo. 423; 1 Mo. 780; 3 Mo. 123.)

EWING, Judge, delivered the opinion of the court.

The only question in the case is the ruling of the circuit court, in refusing a continuance.

It appears from the record that the cause was set for trial on the 6th of May, 1858; (the suit being on a promissory note;) that it was called for trial on that day, but not tried; was again called on the 7th; whereupon the appellant filed his motion, with an affidavit, for a continuance on account of the absence of certain witnesses, which was overruled. The affidavit alleges that, after the cause was set for trial and in ample time before the day of the trial, the affiant caused subpoenas for said witnesses to be issued and placed in the hands of the sheriff; that the sheriff returned said subpoenas "not found;" and that as soon as the affiant discovered this fact, which was not until the 6th day of May, 1858, he searched for said witnesses, and had used his best endeavors to find them and procure their attendance. The bill of exceptions shows that the subpoena for the witnesses, on account of whose absence the application for a continuance was made, did not issue until the 5th of May, only one day before the cause was set for trial; and this was the first time any steps were taken to procure the attendance of the absent witnesses. We think the application fails to disclose any sufficient grounds for a continuance, and that it was properly refused.

Judgment affirmed. Judge Scott concurs. Judge Napton absent.

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THE STATE, Respondent, v. FITZSIMMONS, Appellant.

1. It is discretionary with the court, in the trial of a criminal case, whether the witnesses in attendance shall be separated and ordered to retire so that they may not hear each other's testimony. If such an order be made and be disobeyed, it is, it seems, a matter of discretion with the court whether the disobedient witness shall be examined or not; it is not error to permit him to be examined.

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2. In the trial of a criminal case, the legal existence of a banking corporation may be proved by general reputation. (R. C. 1855, p. 1193, § 23.) This rule is applicable to the case of a corporation organized under the general banking law of another state.
3. Where a statute, on which an indictment is founded, describes or enumerates the offences disjunctively, the indictment, if it contain only one count, should charge them conjunctively if they are not repugnant; as, where the statute makes it an offence to "sell, exchange, or deliver," &c., for any consideration, any falsely made note, &c., it is proper that the indictment should charge the offences conjunctively, that the accused did sell, exchange and deliver, &c. If the offences are not repugnant, the indictment will not be liable to the objection that several offences are joined in the same count.
4. It is no defence to an indictment, founded on the ninth section of the fourth article of the act concerning crimes and punishments, (R. C. 1855, p. 591, § 9,) for selling, exchanging and delivering to another certain falsely made, forged and counterfeit bank notes of a certain denomination, that the bank named never issued genuine bills of the character or denomination of those described in the indictment.
5. To constitute a sale or exchange within the meaning of the said section, it is not necessary that the accused should have parted with his entire interest in the counterfeit paper for a consideration paid; the transaction would, it seems, be within the statute though the sale should be on credit, or, if there were a delivery, if it were understood that they should be returned in case they were not sold.

*Appeal from St. Louis Criminal Court.*

The facts sufficiently appear in the opinion of the court.

*Shreve & Boyce*, for appellant.

I. The court improperly summoned a juror. (Sess. Acts, 1857, p. 661.) The witnesses ordered to be separated disobeyed the order; yet the court permitted them to testify. The court improperly permitted the organization of the company to be proven by reputation. It is not sufficient that the bank was organized under a general banking law. (1 Denio, 9; 23 Wend. 103.) The jury found a verdict in the teeth of the instruction given at the instance of the defendant, that "to constitute a sale or exchange of the bills described, the defendant must have parted with his entire interest in the subject of sale for a consideration." The evidence showed conclusively that the bills described were delivered under an agreement that if the same were passed or utter-

red, in that case defendant should have one-half the proceeds, and, if not sold, nothing. Such a contract is void in law; and there was no consideration given. The instruction given, telling the jury that though the Chippewa bank never issued *genuine* bills of the character or denomination, &c., yet, if the bills were falsely made bills, the defendant was liable, was erroneous. There can be no forgery, or counterfeit bill, without a genuine. To be falsely altered presupposes the existence of a genuine original. (9 Mo. 845.) The court erred in refusing the instructions asked. The indictment is defective, repugnant and contradictory. Selling and exchanging or delivering are distinct offences. If the defendant did one, he could not do the other.

*Mauro*, (circuit attorney,) for the State.

I. The incorporation of the bank was properly proved by reputation. (R. C. 1855, p. 1193, § 23.) There was a sufficient consideration proved for the sale of the spurious notes.

SCOTT, Judge, delivered the opinion of the court.

The defendant was indicted for selling, exchanging and delivering forged counterfeit notes to one George Hawdon for a certain consideration to him paid, which said notes purported to be made and issued by the Chippewa bank, a bank duly incorporated under the laws of the state of Wisconsin. The defendant was convicted and sentenced to the penitentiary, from which he appealed to this court.

One of the points made by the defendant is, that the judge of the court below summoned one of the jurors. It appears that the juror was upon the panel of jurors detailed for service in the cause. As the juror was regularly on the panel, we do not see how the defendant was affected in a way which injured him by the court's calling up the juror to be sworn. It does not appear that any irregularity was produced by this act of the judge.

The court ordered the witnesses to be separated during the examination. This order, however, was not obeyed, and

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some of the witnesses heard others testify during the trial. The defendant objected to those witnesses being examined, who, in violation of the order of the court, remained in hearing whilst other witnesses were testifying. The objection was overruled, and the witnesses were sworn and deposed on the trial. It is a matter in the discretion of the court whether the witnesses shall be separated or not during their examination. Though a matter in the discretion of the court, such a request from either party is usually allowed. If an order is made that the witnesses be separated and it is disobeyed, it is a matter of discretion with the court whether the disobedient witness shall be examined or not. Some maintain that the court can not deprive a party of the evidence of such a witness, his conduct only affording a matter for comment before the jury. (*Parker v. McWilliam*, 6 Bing. 683; *State v. Sparrow*, 3 Murph. 487; *The State v. Brookshire*, 2 Ala. 303; *Greenl. Ev.* § 432.) It is apparent that the witnesses were not in such a situation from hearing the testimony that the exercise of a sound discretion required their exclusion. The matter about which they testified in common was the spuriousness of the notes, a point on which the cause did not turn, and a matter capable of being placed beyond all doubt or cavil by testimony, had it been deemed important.

The bank whose notes were forged was not incorporated by a special act creating a corporation, but it seems that it was created under a general banking law providing the mode by which banking companies might be organized for doing business. The twenty-third section of the sixth article of the act concerning practice in criminal cases enacts, that if, on the trial or other proceeding in a criminal cause, the existence, constitution or powers of any banking company or corporation shall become material or in any way drawn in question, it shall not be necessary to produce a certified copy of the charter or act of incorporation, but the same may be proved by general reputation, or by the printed statute book of the state, government or country by which such corpora-

tion was created. The indictment charges that the forged notes purported to be made and issued by the Chippewa bank, a bank duly incorporated under the laws of the state of Wisconsin. The act creating the corporation or providing for its organization was not produced, nor a copy of it, but the existence of the bank was suffered to be proved by reputation against the exceptions of the defendant. The statute uses the words "banking company" and "corporation" as synonymous. There can be no difference between a banking company organized under a general law and one created by a special act of legislation, so far as the question involved is concerned. If a special act may be proved by reputation, it would seem that a general act would with more propriety be proved in such a manner. If, under a general law, acts are required to be done by individuals before the business of banking can lawfully be commenced, so under all special acts of incorporations things are to be done preparatory to its becoming a lawfully organized body for the transaction of the business for which it was created. There is no more impropriety in suffering the performance of all things necessary to the formation of a banking company to be shown by the existence of the bank, which is proved by reputation, in the one case than in the other. Laws, systems, and modes of doing business, are changing so rapidly, that, unless we disregard words and forms, and adhere to sense and substance, it will be impossible to administer the law. If a bank created by a special act of legislation may have its existence proved by reputation, there is no reason why a bank organized under a general law may not have its existence established in the same way. The general law is as much a charter *pro hac vice* as a special act of incorporation.

We do not see what the cases from New York have to do with this question. There the constitution requires that acts of incorporation shall be passed by a majority of two-thirds of the legislature. The general banking law of that state was held by one court to be within this provision and

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consequently should have been passed by a majority of two-thirds and authenticated accordingly. By another court it was held that the law was not within that constitutional provision, and did not require the assent of two-thirds of the members elected to each branch of the legislature. (*Warner v. Beers*, 23 Wen. 103; *De Bow v. The People*, 1 Denio, 9.) We can not see that the question, what is a body politic or corporate within the meaning of a clause in the constitution of the state of New York? has any bearing upon the question how a banking company must be organized so that its existence may be proved by reputation under the twenty-third section of the sixth article of the act concerning practice in criminal cases.

It is objected that there are several offences joined in one count in the indictment; that the defendant is charged with having made a sale of the notes, which is one offence, and is also charged with having exchanged or delivered the notes, which is another offence. The indictment is founded on the ninth section of the fourth article of the act concerning crimes and their punishments, and charges that the defendant feloniously did sell, exchange, and deliver to one George Hawdon, for a certain consideration to him paid by the said George Hawdon, to-wit, for the sum of six dollars, &c. The section of the act referred to provides that "every person, who shall sell, exchange or deliver, or offer to sell, exchange or deliver, or receive upon a sale, exchange or delivery, for any consideration, any falsely made, altered, forged or counterfeited note, check, bill, draft, or other instrument," &c. An offence in an indictment must not be stated in the disjunctive, so as to leave it uncertain what is really intended to be relied on as the accusation. Thus to say that the defendant forged or caused to be forged, that he erected or caused to be erected a nuisance, is not sufficiently positive. (1 Chit. Cr. L. 231.) Where a statute, on which an indictment is founded, enumerates the offences or the intent necessary to constitute such offences disjunctively, the indictment must charge them conjunctively where the acts are not re-

pugnant; as where an act against unlawful shooting affixed a penalty when the act was done with an intent to maim, disfigure, disable or kill, (in the disjunctive,) the indictment must charge the intent conjunctively. So in England, under statutes describing the offences disjunctively, it was held fatal to say the defendant forged *or* caused to be forged an instrument. (Whar. Cr. L. 172.) So where a statute used the words "cut *or* deface," an indictment charging the offence in the conjunctive "cut and deface" was held proper. (Crown C. C. 82.) In the case of the Commonwealth v. Twitchell, 4 Cush. 74, it was held that in an indictment on the statute, by which the setting up *or* promoting of any of the exhibitions therein mentioned without license therefor is prohibited, it was not duplicity to allege that the defendant did set up *and* promote such an exhibition. No doubt it would be better, in all cases where the offence or the intent is described by words in the disjunctive, to have a count on each word and intent; but the contrary course has been too long sanctioned now to be abandoned but by force of legislation.

The defendant excepted to the instruction to the effect, that, though the Chippewa bank never issued genuine bills of the character or denomination of those described in the indictment, yet, if the bills were falsely made bills, they are within the statute. The words *falsely made* are used in the section on which this indictment is framed. Forgery at common law denotes a false making, which includes every alteration of or addition to a true instrument. (2 East, 852.) It can not be maintained that there can not be a forgery unless there is a previously existing genuine instrument identical with that forged.

We are not prepared to say that the instruction given for the defendant, to the effect that "to constitute a sale or exchange of the bills described, he must have parted with his entire interest in the subject of each, for a consideration paid," is correct. If there was a sale of the bills followed by a delivery, we can not see how the matter can be bettered

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for the prisoner because the consideration was not paid down. The injury to the community is as great in the one case as the other, and both contracts are equally within the words of the law. There may be a valid sale on credit; and it is out of the question that the prisoner should be heard to allege that, though he made a sale, yet, as the consideration of the sale and delivery was an act to be done in future, and as the performance of that act could not be compelled by law, therefore there was no sale. If the consideration of the sale of the notes was a part of the money to be earned by their resale, if the sale was accompanied with a delivery of the notes, the transaction was within the statute, though the notes were to be returned in the event of their not being sold. The whole transaction, in all its parts, was criminal and void; and because the law, in describing it, uses language that is properly appropriated to valid transactions, it would be singular if those guilty of the offences described should be allowed to go free on the ground that their acts were void and amounted to nothing in law.

Judgment affirmed. Judge Ewing concurs. Judge Napton absent.

GARNIER, Respondent, v. PAPIN *et al.*, Appellants.

1. The creditors of one A. agreed to give to him and his endorsers an extension of time on their obligations. B., one of the creditors of A. signed this agreement in the following form: "B.—provided I have the same endorsers for \$3,500." B. surrendered to the trustees appointed by the creditors notes to the amount of \$3,500, which were cancelled and a new note given. *Held*, in a suit instituted on a note not included among those amounting to \$3,500 surrendered to the trustees, that the agreement to give time did not apply to the note sued on.
2. An agreement to give an extension of time on a promissory note constitutes no bar to an action thereon.

*Error to St. Louis Circuit Court.*

This was an action by L. C. Garnier against J. L. Papin, C. D. Sullivan, J. T. Sullivan and S. Myerson on a negotia-

ble promissory note for five hundred dollars, dated August 17, 1857. The defendant Papin was sued as maker, the others as endorsers. The plaintiff dismissed as to Myerson. The defendants C. D. & J. T. Sullivan set up the following defence: "That, by an agreement duly executed and for a valuable consideration, said plaintiff has, with the other creditors of Joseph L. Papin, covenanted and agreed to extend all paper of said Papin, whereon these defendants here answering are endorsers, and including the note here sued on, so that the same shall be due and payable as follows: twenty per cent. thereof in twelve months; thirty per cent. in eighteen months, and the remainder of fifty per cent. in twenty-four months, from and after the first day of January, 1858." It was agreed that the trial should proceed upon the issue raised in the answer as above set forth, and that according as that issue should be found for or against said defendants, the Sullivans, the judgment should be given against all the defendants.

The defendants introduced in evidence certain articles of agreement between said Papin and his endorsers and his creditors. By this agreement the creditors, in consideration that the endorsers, who had received securities for their endorsements, and attaching creditors, should give up and place in the hands of trustees for the benefit of the creditors, all the property held as security, and release the property attached, and in consideration of other transfers to said trustees, agreed to extend the time of payment of the liabilities of Joseph L. Papin, and to his endorsers—"notes and bills endorsed by C. D. Sullivan & Co. [and others] to be extended and paid, twenty per cent. in twelve months, thirty per cent. in eighteen months, and fifty per cent. in twenty-four months, with interest," &c. This agreement was signed by plaintiff as follows: "Louis C. Garnier—provided I have the same endorsers for \$3,500."

It was admitted that Messrs. Hughes & Marshall were chosen trustees by the creditors; that all the creditors, excepting one attaching creditor, and divers small claimants,

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Garnier v. Papin.

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had signed said agreement; and the conveyances of property mentioned in the agreement had been made to the trustees, and that said trustees were administering the trust.

A statement of one of the trustees (Marshall) was read in evidence, subject to exceptions for incompetency and irrelevancy. From this it appeared that Garnier, upon the execution of the above agreement, surrendered notes amounting to \$3,500, which were cancelled, and a new note given with Robert Forsyth as endorser. At the time Garnier signed the agreement, he said that he had another note of \$500—the note in controversy—for which he had a collateral security given by Chouteau and Myerson; that he did not like to sign for that, as it might impair his collaterals. The trustee finally allowed him to sign for the \$3,500. To the admission of this conversation the defendants objected. The objection was overruled.

The defendants asked and the court refused the following declarations of law: “1. There can be no evidence introduced by plaintiff so far to contradict or vary the written agreements of the parties as to establish that there existed an understanding between plaintiff and Marshall to the effect that plaintiff verbally and expressly reserved the note now sued on. 2. Any agreement between plaintiff and Marshall is not binding upon the defendants, unless it be shown that Marshall was their agent in the transaction, or that his agreement was subsequently known to and approved of by them. 3. If there was a secret understanding with defendants, or their agent, that the note sued on should be reserved, and on this condition that he signed the articles of statement embracing all claims, then such an agreement is a fraud upon creditors, is void, and plaintiff can not recover.”

*A. J. P. Garesché*, for appellants.

I. According to the theory of the plaintiff, the defendants in this cause, who were protected in their endorsements, stripped themselves of this protection and surrendered the

property to a trust fund, out of which plaintiff was to be paid as a preferred creditor \$3,500, for debts on which the defendants were not responsible, and yet the agreement was not to operate upon the only debt he held on which they were endorsers. Defendants did not assent to this reservation; there was no attempt to prove knowledge or assent. There is no proof of any such reservation except the testimony of Marshall. The proviso about "same endorsers" is surplusage. Composition did not release endorsers; it only gave them an extension. The testimony of Marshall was to vary the written agreement and therefore incompetent. Even if these defendants had consented to the reservation, the reservation would have been void, because constructive or implied fraud. (Willard, Eq. 209; 1 Sto. Eq. 378; Chitty on Contracts, 685; Story on Contr. 647; Jeremy on Eq. Ins. 419; 12 Pet. 199; 9 Ind. 432; Burrill on Assign. 147; Byles on Bills, 200; 7 W. & S. 79; 1 Comst. 186.) The court should have given the instructions asked.

*H. N. Hart*, for respondent.

I. The instructions asked were properly refused.

SCOTT, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note against the maker and endorsers. By the consent of the parties, the cause was made to turn on the issue, that the plaintiff, by an agreement, duly executed and for a valuable consideration, with the other creditors of Jos. L. Papin, covenanted and agreed to extend all paper of said Papin whereon these defendants here answering are endorsers, including the note here sued on, so that the same shall be due and payable as follows: twenty per cent. thereof in twelve months; thirty per cent. in eighteen months, and the remainder of fifty per cent. in twenty-four months from and after the 15th of January, 1858.

The plaintiff signed this agreement, but in such a way as

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not to restrain him from bringing this suit, as he maintained. His signature was made in this manner: "Louis C. Garnier—provided I have the same endorsers for \$3,500." The plaintiff surrendered notes of the description contained in the agreement to the amount of \$3,500, but the note in suit did not make part of the amount of \$3,500. From this statement of facts it is clear that the plaintiff never did agree to give time on this note. Although his duty to the other creditors, who agreed to give time, might have required that he should have done this, yet he did not do it. He complied with his contract to the extent he undertook to perform it. It is evident that the testimony does not support the issue. The issue is, that the plaintiff did an act; the evidence shows that he ought to have done it, but did not do it. It is not necessary to inquire whether the facts would have entitled the defendants to any relief of an equitable nature by way of injunction, restraining the plaintiff from the prosecution of this suit. No such defence has been made, and no prayer for such relief has been preferred.

The defence made in the answer could not have been sustained on a demurrer. A promise not to sue *at all* on a bond is a good defence, because such a promise amounts to a release. But where a bond is due or to become due, and a promise is made not to sue until some time later than that fixed by the instrument, such promise, however solemnly executed, is no defence to an action on the bond. (Bircher v. Payne, 7 Mo. 430.)

From the view we take of the evidence and pleadings in the case, there was no error in refusing the instructions asked by the defendant, as they did not meet the issue on which the cause was tried.

Judge Ewing concurring, the judgment will be affirmed. Judge Napton absent.

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Marguard v. Rieter.

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## MARGUARD, Respondent, v. RIETER, Appellant.

1. A. brought an action for assault and battery against B. B. demurred to the petition. The demurrer was overruled, a default taken, and an assessment of damages had and judgment rendered therefor. B. moved the court to set aside the judgment on the ground that plaintiff's counsel had taken judgment by default in violation of an agreement entered into by him with defendant's counsel not to take action in the cause during the temporary absence of the latter. This motion was overruled. The defendant appealed to the supreme court. Pending this appeal the plaintiff died and his administrator was substituted. *Held*, that under such circumstances, the supreme court would not reverse, as a reversal would be equivalent to a dismissal of the suit.

*Appeal from St. Louis Circuit Court.*

This was an action for an assault and battery. The defendant demurred to the petition. The demurrer was overruled, and a judgment by default rendered against defendant, and an assessment of damages was had. The defendant moved the court to set aside the judgment and grant a new trial. The ground of this motion, as appeared from the accompanying affidavits, was that the plaintiff's counsel agreed during the pendency of the demurrer that he would let the matter rest and take no action therein during the temporary absence from the city of the counsel for the defendant. This agreement, it is alleged, was violated. The court overruled the motion. The defendant appealed to the supreme court. During the pendency of the appeal in the supreme court the plaintiff died, and his administrator was substituted as plaintiff.

*Gibson*, for appellant.

I. This was not a case of neglect, inattention or want of diligence on the part of defendant. The defendant's counsel was misled and deceived by the agreement entered into, which was broken and not kept. This was the sole cause of the non-appearance of defendant. It would be gross injustice, under such circumstances, to require defendant to pay

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Moore v. Albright.

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the exorbitant verdict rendered. The verdict was excessive and exorbitant, and grossly unjust; it was a mere *ex parte* assessment.

*A. M. & S. H. Gardner*, for respondent.

I. The motion was properly overruled. Defendants failed to exercise diligence in prosecuting their defence. The motion was not filed within the time prescribed by statute. Final judgment was rendered March 19, and the motion was not filed until April 3. (R. C. 1855, p. 1286, § 6.) The respondent is dead; the suit will abate if the judgment is reversed.

NAPTON, Judge, delivered the opinion of the court.

We have not been able to perceive in the record any reason for refusing the defendant a trial in this case by the circuit court, but it is obvious that we can not remedy the injustice, if any has been done. Since the rendition of the judgment the plaintiff has died, and to set aside the judgment now is of course equivalent to a dismissal of the suit.

Judgment affirmed.



MOORE *et al.*, Plaintiffs in Error, v. ALBRIGHT *et al.*, Defendants in Error.

1. Where a creditor in stating an account between himself and his debtor gives a credit therein to the latter by mistake, or is induced to give such credit on terms and conditions that are not afterwards complied with by the debtor, he ought to be permitted to avail himself of these facts in a suit against the debtor to recover the item for which the credit was allowed.

*Appeal from St. Louis Circuit Court.*

This was an action to recover \$188.57 for goods sold and delivered. The defendants set up that the indebtedness sued for was cancelled. In support of this defence the defendants adduced in evidence                      er, dated New York, July 17,

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1857, written by the plaintiffs to the defendants. In this letter the account between the plaintiffs and defendants is stated. Among the credit items in the account is the following: "By amount to your credit account loss—\$188.57." The following passages were also contained in said letter: "We have agreed to cancel the claim due May 5th, &c.;" "we send you a memorandum of amount drawn for below, which will close the old account, and leaves amount purchased since the fire only to your debit, which we hope will be acceptable to you, and be duly honored on presentation;" "we hope in future to be able to arrange matters so as to avoid the necessity for any disagreement upon the subject of goods not coming to order." The plaintiffs in rebuttal read the deposition of one Bowron, the book-keeper of plaintiffs, who deposed to the purchase of the goods sued for by defendants. The deposition contains this passage: "About the month of July, 1857, Messrs. John P. Moore & Son offered to Messrs. T. J. Albright & Son to make some reduction in the amount due from T. J. Albright & Son to them on certain terms and conditions, which offer was not accepted and acted upon, and such terms and conditions were not complied with by Messrs. T. J. Albright & Son, and therefore such offer became null and void."

The court refused the following instructions or declarations of law: "1. If after the goods were sold and delivered to the defendants, plaintiffs voluntarily consented to forego their debt, but no consideration existed in this promise, nor any by the evidence has been shown, then plaintiffs are entitled to recover. 2. If the plaintiffs' promise to cancel was upon certain terms and conditions to be fulfilled by defendants, and such terms or conditions were not fulfilled, then plaintiffs are entitled to recover."

Plaintiffs took a nonsuit, with leave, &c.

*A. J. P. Garesché*, for appellants.

I. The court erred in refusing to give the instructions asked. They were supported by the evidence. The con-

ditions upon which the debt was to be cancelled were not fulfilled.

*Carroll*, for respondents.

I. The account stated in the letter was conclusive between the parties unless some fraud, mistake or inaccuracy had been shown. (*Paul v. Carroll*, 16 Mo. 241; 12 Mo. 162.) Nothing of that sort is pretended.

SCOTT, Judge, delivered the opinion of the court.

The account stated in the plaintiffs' letter of July 17, 1857, *prima facie* showed that they were not entitled to recover. If the credit given the defendants for \$188.57 loss was the same sum for which this suit is brought, the plaintiffs clearly could not recover unless they explained why they would take away from the defendants a credit which they had given them. Whether the items are identical is a question for the jury. The plaintiffs have not seen proper to have copied in the record the account on which their suit was instituted. There is evidence enough of a consideration for the credit given to the defendants contained in the plaintiffs' letter read to the jury, if proof of any consideration was necessary.

The court erred in refusing the second instruction asked by plaintiffs. If they had given credit by mistake, or had been induced to enter it on terms which were not afterwards complied with, they ought to have been permitted to show those facts. Whether there was evidence enough to sustain the defence assumed in the instruction was a matter for the jury. We have nothing to do with that. The jury will determine what weight should be given to such general declarations as were made by the witness, who was so kind as not only to testify, but to tell them the law arising upon his evidence.

The other judges concurring, judgment reversed and cause remanded.

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Westcott v. De Montreville.

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WESTCOTT, Respondent, v. DE MONTREVILLE, Appellant.

1. To enable a defendant to avail himself of a want of demand on the part of the plaintiff of a sum of money claimed to be due, the defendant should set up the matter in his answer, and accompany the same with a tender of the amount due; in which case, if the plaintiff will further prosecute his suit, and shall not recover a greater sum than is tendered, he shall pay all costs. (R. C. 1855, p. 448.)

*Appeal from St. Louis Law Commissioner's Court.*

*Sterling*, for appellant.

*Gardner*, for respondent.

EWING, Judge, delivered the opinion of the court.

The defendant being indebted to the plaintiff in the sum of thirty-eight dollars and seventy cents, gave him a currency check on the Mutual Savings Institution of St. Louis, which was paid in currency. Shortly after, thirty dollars of the amount was returned and left with defendant's clerk. Defendant being informed of the return of the money directed his clerk to take it back to the plaintiff, and if he refused to receive it, to deposit it with the (same) Savings Institution. The money was not received by the plaintiff, he saying he could do nothing with the currency; whereupon it was deposited by the clerk as he was directed, a bank book having been given by the defendant to the clerk for that purpose. There was a trial by the court, a jury being waived, and judgment for the plaintiff for thirty dollars. No declaration of law or instructions were asked by either party, and the record presents no point of law for our consideration.

It may be observed with regard to the question of a demand, to which some allusion is made in counsel's brief, that even if this were a case in which a demand was necessary prior to the institution of the suit, the want of it is not available to a party unless he expressly sets it up by way of defence in the answer or replication, and accompanies it with a tender of

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Brent, by Guardian, v. Grace's Adm'r.

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the amount due ; in which case, if the plaintiff will further prosecute his suit, and shall not recover a greater sum than is tendered, he shall pay all costs. (1 R. C. 1855, tit. Costs, § 34, p. 448.)

Judgment affirmed, with ten per cent. damages ; Judge Scott concurring. Judge Napton absent.

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BRENT, BY GUARDIAN, Plaintiff in Error, v. GRACE'S ADMINISTRATOR, Defendant in Error.

1. The settlements and allowances of a guardian in a probate court in the matter of his guardianship have the force and effect of judgments, and can be set aside in an equitable proceeding against him only upon proof that they were procured by fraud.
2. Upon such an issue it is no proof of fraud in procuring the allowances that the guardian made expenditures for the maintenance and education of his ward without first procuring an appropriation by the probate court ; the allowance of an account for expenditures already made satisfies the statute. (R. C. 1855, p. 826, § 24.)
3. If a guardian, instead of expending the money of his ward for the latter's maintenance and education, gives his individual note therefor, and receives receipts from the creditor, and procures a credit therefor in his settlement with the probate court, this will not constitute fraud as against the ward ; the ward, in such case, would not, it seems, be liable for the debt.

*Error to St. Louis Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Buckner*, for plaintiff in error.

I. The evidence shows that the guardian expended all the money and means of the ward, and upon final settlement brought her in debt, and that without authority from the probate court to make such expenditures ; and also, that after creating debts, he executed his individual note to the Sisters of the Visitation Academy, and upon the strength of that mode of action he procured a credit as for so much money paid. The Sisters claim that they hold a valid debt against plaintiff. The execution of the note was not a satis-

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Brent, by Guardian, v. Grace's Adm'r.

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faction of the claim. Grace expended the whole of his ward's estate without the authority of the probate court and in violation of the statute, and falsely represented to the court that he had paid for his ward's tuition and boarding. If these acts constitute fraud, we are entitled to have the settlements set aside. (1 Sto. Eq. § 186.)

*Garesché*, for defendant in error.

I. In order to authorize the expenditure of money by a guardian for the education of his ward, it is not necessary that the probate court should have formally ordered him to do so. In the absence of such order the guardian, it is true, acts at his own risk. When his expenditures have been sanctioned by the probate court and allowed him in his settlement, this is an appropriation in the sense of the twenty-second section of the act concerning guardians. (R. C. 1845, p. 551.) There was no proof to sustain the allegations of the petition. (*Jones v. Brinker*, 20 Mo. 88; *State v. Roland*, 23 Mo. 88; *Mitchell v. Williams*, 27 Mo. 400.)

EWING, Judge, delivered the opinion of the court.

This is a proceeding in the nature of a suit in chancery against the administrator of Grace, who was the former guardian of the plaintiff, to falsify and set aside the settlements of said Grace as such guardian with the probate court.

The supplemental petition alleges in substance that money and property of the plaintiff came to the hands of said guardian, as shown by the inventory filed with the petition; and that said guardian, in his settlements with the probate court in September and December, 1851, falsely and fraudulently procured allowances against the plaintiff, for which he obtained credit in such settlements; that said guardian having placed his ward at the Academy of the Visitation and being indebted for her board and tuition, he fraudulently obtained the receipts of the institution for the same, with which he was credited in his settlement with the court, when in fact the same was never paid by him. There was an answer de-

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Brent, by Guardian, v. Grace's Adm'r.

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nying the allegations of the petition. On the trial (by the court) the plaintiff read in evidence the settlements of the guardian duly certified, and introduced Judge Ferguson of the probate court, who stated that the guardian, Grace, never applied to him for an order authorizing expenditures for the maintenance and education of his ward, and that no such order appears on the records of the court; which was all the evidence in the case.

The settlements, which are certified as correct, show a balance in favor of the guardian. It is admitted that the guardian obtained receipts for the board and tuition of his ward from the academy, for which he gave his own note, and that this note remains unpaid, but the fraud imputed to the defendant's intestate in the transaction is denied. The settlements of the guardian with the court, having the force and effect of judgments, can not be set aside without establishing by proof the charge of fraud. The credit for the school account was allowed by the guardian upon regular and authentic vouchers showing the expenditures; and instead of paying the ward's money, he gave his individual note, and made the debt his own; and this, as it respects the ward, is a satisfaction of the demand, even if the contract made by the guardian could have been enforced against her at all. The academy is not here complaining and asking a reinvestigation of the guardian's accounts; and no ground is shown for the plaintiff to do so by reason of any liability on her part for the debt. If the guardian had money of his ward, which could have been applied in payment of this debt, and the academy omitted to demand payment out of this fund, but took the guardian's note instead, thereby allowing him to use and misapply his ward's money, if misapplied, [it] can not now shift the responsibility from the guardian to his ward. If the ward could be held liable under such circumstances, every minor would be personally liable for debts contracted by the guardian, although the guardian may have misapplied the estate entrusted to him for the very purpose for which such debts were incurred.

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Brent, by Guardian, v. Grace's Adm'r.

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There is nothing in the objection that no previous order was obtained from the probate court authorizing expenditures for education and maintenance. It is the duty of the court to order the proper education of minors according to their means, and for that purpose it may from time to time make the necessary appropriations of the money or personal estate of any minor. (1 R. C. 1855, p. 826, § 24.) The guardian may, if he chooses, apply in the first instance for an order and appropriations; but if he does not, and takes the risk of having his accounts disallowed when he makes his settlements, that is his own concern, and his omission to do so is no fraud upon his ward. The court, in either case, determines whether the expenditures are necessary and proper; and allowing accounts for expenditures already incurred is, in effect, the same as making a formal order for appropriations beforehand, and equally satisfies the statute.

Judgment affirmed; the other judges concurring.

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BRENT, BY GUARDIAN, Plaintiff in Error, v. GRACE'S ADMINISTRATOR, Defendant in Error.

1. Brent v. Grace's Administrator, ante, p. 253, affirmed.

*Error to St. Louis Circuit Court.*

*Buckner*, for plaintiff in error.

*Garesché*, for defendant in error.

EWING, Judge, delivered the opinion of the court.

This case is like that of Jane Brent against Garesché, administrator of Grace, decided at this term. Judgment affirmed.

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Brent, by Guardian, v. Grace's Adm'r.—Sutter v. Craft.

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BRENT, BY GUARDIAN, Plaintiff in Error, v. GRACE'S ADMINISTRATOR, Defendant in Error.

1. Brent v. Grace's Administrator, ante, p. 253, affirmed.

*Error to St. Louis Circuit Court.*

*Buckner*, for plaintiff in error.

*Garesché*, for defendant in error.

EWING, Judge, delivered the opinion of the court.

This case is like that of Jane Brent against Garesché, administrator of Grace, decided at this term. Judgment affirmed.



SUTTER, Respondent, v. CRAFT, Appellant.

1. Judgment affirmed.

*Appeal from St. Louis Law Commissioner's Court.*

*Holmes & Romyn*, for appellant.

*A. M. & S. H. Gardner*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action for an alleged breach of warranty of soundness in the sale of a horse. The answer denied any warranty.

The only questions for our consideration arise upon the instructions. All the instructions asked by the appellant, with one exception, were given. The one refused was erroneous, because the words it assumed as having been used by the vendor in the sale of the horse, and which the court was asked to declare did not amount to a warranty, were not the

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Gray v. Rogers.

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statements proved to have been made by him, or, at any rate, not all the facts in the case tending to establish a warranty.

The law applicable to the case was properly declared in the instruction given at the instance of the respondent.

Judgment affirmed; Judge Scott concurring. Judge Napton absent.

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GRAY, Respondent, v. ROGERS *et al.*, Appellants.

1. If a landlord sells the leased promises to another, the defendant is not thereby discharged of his obligation to pay rent to the vendor, unless the vendee give him notice that he claims the rent.

*Appeal from St. Louis Land Court.*

This was an action to recover the rent of certain premises, a portion of a tract of one by forty arpens known as the Lirette arpent. The plaintiff, as assignee of Norman Cutter, claimed rent of said premises from September 10, 1855, to September 10, 1857, during which time, it is alleged, the defendants held said premises as tenants of said Norman Cutter at a yearly rent of two hundred and twenty dollars. The defendants denied their tenancy under said Cutter during said period, and alleged that prior to said September 10, 1855, said Cutter conveyed all his interest in said land to Daniel D. Page and Henry D. Bacon. Evidence was adduced to show that the defendants held possession of said premises as tenant under Norman Cutter, by virtue of a verbal renewal of a former lease executed by said Cutter. The defendants introduced evidence to show that in 1852 and 1854 said Cutter executed two several deeds, duly recorded, conveying his interest in said premises to said Page and Bacon. These deeds were absolute in form, and Cutter testified that the second deed was intended as a mortgage only; that he had an arrangement with said Page and Bacon to the effect that he should collect the rents. It appeared also in evi-

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Gray v. Rogers.

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dence that defendants paid rent to plaintiff up to March 10, 1856.

The court refused the following instructions asked by defendants: "1. If the jury find from the evidence that Norman Cutter, the assignor of plaintiff, conveyed all his interest in the premises described in the petition to H. D. Bacon and D. D. Page by deeds duly recorded prior to the 10th of September, 1855, they will find for the defendants, unless they find there is a valid agreement in writing signed by the parties to be charged therewith, that said interest shall be reconveyed to said Cutter. 2. The jury are instructed that the deeds and bond, copies of which have been read in evidence, passed all the title of Norman Cutter to the lands therein described to H. D. Bacon and D. D. Page, subject to the bond read in evidence; and any verbal agreement between the parties can not serve to revest the title in said Cutter so far as third persons are concerned, unless they have full notice of the same. 3. The jury are instructed that the conveyances from Cutter to Page and Bacon are absolute on their face, and operate as an assignment of any lease of said premises executed prior thereto, and that plaintiff can not recover in this action rents which accrued subsequent to such assignment. 4. The jury are instructed that the conveyances from Cutter to Page and Bacon are absolute on their face, and that in this action they can not be proved to be otherwise by parol evidence."

At the defendants' instance the court gave the following instruction: "5. If the jury find that N. Cutter, the assignor of plaintiff, sold a portion of his interest in the land described in the petition prior to the 10th of September, 1855, they will find for the plaintiff only such portion of the rent claimed by him as he retained interest in the land; if he retained fifteen twenty-fourths, they will find a verdict for fifteen twenty-fourths of the rent claimed, after deducting six months' rent ending March 10, 1856, proved to have been paid."

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*Gray v. Rogers.*

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The jury found for plaintiff and assessed his damages at two hundred and ten dollars and thirty-seven cents.

*Wickham & Snead*, for appellants.

I. The deeds to Page and Bacon are absolute on their face. They passed all of Cutter's title, and with it the right to collect rent. (6 Wend. 671; 22 Wend. 121; Taylor, L. & T. 426, § 629.) It is not competent at law to show that a deed absolute on its face is in fact a mortgage in a collateral proceeding. (10 Mo. 484; 6 Hill, 219; 9 Louis. 563; 12 Mass. 375; 15 Mass. 210.) The evidence must be in writing. (1 Johns. Ch. 429.) Defendants had no notice of the fact that the deed was a mortgage. A judgment in favor of plaintiff in this action would be no bar to a suit by Page and Bacon for the rent.

*Gray*, for respondent.

I. The defendants held the premises as tenants of Cutter during all the time that the rent sued for accrued. Defendants did not disclaim holding under Cutter, nor attorn to Page and Bacon; nor did Page and Bacon ever claim any rent, but authorized Cutter to collect rents. Defendants could not be permitted to disown or deny Cutter's right. The deed of Cutter was a mortgage. After date of last deed defendants paid rent to Cutter. (See 5 Pick. 124; 17 Mo. 58; 9 Wend. 227; 21 Wend. 36; 1 Hill, 606; 2 Phill. on Ev. p. 644; 14 Wend. 63; 4 Man. & Ry. 193; 9 B. & Cr. 245; R. C. 1855, p. 1013.)

SCOTT, Judge, delivered the opinion of the court.

The controversy seems to be abandoned as to half the rent claimed, as the plaintiff has not appealed from the judgment of the court below. The defendants were tenants under Cutter—who has assigned his claim to the rent to the plaintiff—when the deed was made by Cutter in 1854 to Page and Bacon. It is singular the defendants should be making a de-

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Gray v. Rogers.

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fence for the benefit of Page and Bacon, when they have not been required to do so. Page and Bacon have never required rent of them. The recording of the deed made by Cutter to Page and Bacon does not affect the defendants, as they were tenants under Cutter before the deed was executed. That is not a matter of which they were required to take notice. If Page and Bacon claim the rent, they should give notice to the defendants to pay it to them. The defendants, from the case as presented, would avoid the payment of rent to anybody. Cutter explains why Page and Bacon have never demanded the rent. They authorized Cutter to receive the rents and profits, and the defendants promised to pay him the rent, thereby recognizing him as their landlord, both before and after the deed to Page and Bacon. We do not see how the defendants are in any danger, as they have never had notice from Page and Bacon, nor been required to pay them rent. They do not, in their defence, state the fact that the rent has ever been claimed from them by Page and Bacon, although their right to it, if they had any, had existed for years. So far from any thing of the kind, they assert that the assignment of the rent by Cutter to the plaintiff was made with an intent to defraud the creditors of Cutter, thereby impliedly admitting that he was entitled to the rent. If the assignment was fraudulent, it was no concern of the defendants. They were never required to attorn to Page and Bacon, and until that is done or notice given, how can they be held liable to them for rent? This is not the case of one taking a lease from a vendor after he has conveyed away the premises by a recorded deed.

None of the instructions asked by the defendants assumed the existence of the fact, that they had been notified to pay rent to Page and Bacon, or that Page and Bacon had required an attornment to them. Judging from the record, the defendants stand now as they did when they entered under Cutter. This is not a controversy between Cutter or his assignee on one side, and Page and Bacon on the other. Page and Bacon have done nothing showing that they claimed

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McLean's Adm'r v. Bragg.

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the rent in controversy, and the defence of their rights by the defendants is entirely gratuitous.

Judgment affirmed ; the other judges concurring.



MCLEAN'S ADMINISTRATOR, Respondent, v. BRAGG, Appellant.

1. The supreme court will not grant new trials on the ground that the verdicts are against the evidence.

*Appeal from St. Louis Circuit Court.*

Edward C. Blackburn and Milton N. McLean were partners as attorneys at law. McLean died, and the plaintiff, Ricords, was appointed administrator of his estate. Blackburn also died, and said Ricords then took charge of the partnership effects, giving bond as required by the statute. It is in this capacity, having in charge the settling up the affairs of the partnership, that the plaintiff now sues. The facts sufficiently appear in the opinion of the court.

*H. N. Hart*, for appellant.

*Cline & Jamison*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action brought by Ricords, as administrator of the estates of Blackburn and McLean, to recover five hundred and seventy-seven dollars and fifty cents for professional services alleged to have been rendered by said Blackburn and McLean as attorneys at law for said Bragg. An account is filed with the petition setting forth the items, two of which are two hundred and fifty dollars for prosecuting and defending libel suits, the defendant being plaintiff in one and defendant in the other. The services in these cases are admitted in the answer, but it alleges the charges therefor to be unreasonable. As to the balance of the account, some of the items are denied, and the services in the others are ad-

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mitted, but the reasonableness of the charges denied. The cause was tried by a jury, and a verdict rendered for plaintiff for five hundred and ninety-four dollars, of which twenty-seven dollars and fifty cents were remitted by the plaintiff.

No instructions were asked by either party, and none given by the court; and the record presents no question of law for our revision. On the part of the plaintiff it was proved that the fees of two hundred and fifty dollars each were very reasonable for the services rendered by Messrs. Blackburn & McLean, and as to one of them this statement was corroborated by the defendant's evidence. The testimony on the part of the defendant also shows that Messrs. Blackburn & McLean died before one of the suits—McLean v. Bragg—was finally determined, and that another attorney was employed by the defendant after their death to defend it; that it was finally compromised by the payment to McLean of one thousand dollars, and that the defendant paid the attorney last employed one hundred dollars for his services in the suit; that the services of Messrs. Blackburn & McLean in this suit were not worth as much as in the other. This is substantially the whole evidence in the case, except what relates to a few small items about which there is no controversy; and as the only question presented is one as to the weight of evidence, there is nothing in the motion for a new trial which would authorize this court to interfere with the verdict of the jury.

Judgment affirmed, with ten per cent. damages.



McMURRAY *et al.*, Respondents, v. TAYLOR, Appellant.

1. The taking of a promissory note does not extinguish an open account; upon the production of the note a recovery may be had on the account.
2. Where a note has been taken for an indebtedness evidenced by open account, and a receipt given therefor, a statement in the receipt to the effect that the note was taken "in settlement of the account" would not be sufficient, alone, to authorize the court to submit to the jury, by instruction,

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the issue whether the note was taken in payment or satisfaction of the account.

3. If a contractor, who has furnished materials for, and expended work and labor upon, the construction of a building for another, receives from the latter a promissory note for the sum due, payable at a time beyond the expiration of the period within which he must file his lien under the act with respect to mechanics' liens, but within the period within which suit must be commenced, if at all, to enforce the lien, he will not thereby have waived his right to file his lien or to enforce the same against the building; he merely suspends his right of action. The filing of the lien is not the bringing of a suit.

*Appeal from St. Louis Land Court.*

This was a suit to enforce a mechanic's lien. It is sufficient to state, in addition to the facts set forth in the opinion of the court, that the amount found at the settlement on December 20, 1856, to have been due the plaintiffs at the time of the completion of the work, November 29, 1856, was \$1,610.87. The note given the plaintiffs on the 20th of December was for this sum, including legal interest up to that date—\$1,635.03. In this suit the plaintiffs claim \$1,610.87, with interest from November 29, 1855. The said sum of \$1,610.87 was found to be due the plaintiffs by decision of arbitrators. Evidence was introduced to prove that it was agreed between the parties that a note payable in ninety days was to be given for the sum found to be due by the arbitrators. One of the witnesses testified, with respect to a receipt given by plaintiffs for the note given, as follows: "The language of the note was that the note was taken in settlement of the account. It did not state that it was in full when the note was paid."

The court refused the following instructions asked by defendant: "1. If the jury believe from the evidence that the plaintiffs took the note of the defendant at ninety days and receipted the account, then the note was, *prima facie*, a payment of said account, and the filing of said account in the clerk's office of the land court was a nullity and gave plaintiffs no lien on the premises described in the petition. 2. The taking of the note of the defendant by plaintiffs sus-

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pended all proceedings and remedies on the account till the maturity of the note, and the filing of the account before the note became due did not secure to plaintiffs any lien. 3. In order to secure a lien on the premises described in the petition, it was necessary that the demand of plaintiffs should be due and payable within ninety days from the completion of the work and furnishing the materials, and that within said ninety days the demand should be filed in the clerk's office of the land court; and the taking by plaintiffs of a note payable more than ninety days from the completion of the work and the furnishing of the materials, was a waiver of plaintiffs' lien; and if such note was taken by plaintiffs, the jury will find for the defendant. 4. If the jury believe from the evidence that plaintiffs agreed to take defendant's note at ninety days for such sum as the arbitrators might find due plaintiffs in payment of the demand due them, and did so take defendant's note, then the jury will find for defendant."

*Gray*, for appellant.

I. The plaintiffs, by taking a note payable after the expiration of the ninety days allowed by the lien law, waived and lost their lien. (9 Mo. 59, 64, 67; 5 Beav. 415; 2 Cr. M. & R. 187.) Plaintiffs could not sue on the account, nor file a lien, nor take any steps, preliminary to a suit. (See 16 B. Monr. 605.) The moment plaintiffs took the note and receipted the account, the account was merged in the note, at least for the time the note had to run. Admit that after the dishonor of the note, the account might be resuscitated and proceeded on by surrendering the note, yet they could not do this before the note became due. Till the note became due the only demand was on the note. At the date of the filing of the lien the true demand was on the note. Plaintiffs filed only the account. Besides, there was testimony tending to prove that plaintiffs took the note as payment. The court, therefore, erred in refusing the instructions asked.

*H. N. Hart*, for respondents.

I. The promissory note was not an extinguishment of the

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original indebtedness. (1 Hill, 516; 1 Cow. 290; 5 Wend. 490; 19 Wend. 516; 21 Wend. 450.) Nothing but an express extinguishment by release or payment will discharge the lien. (See 2 Browne, 297; 5 Watts, 119; 2 Binn. 146; 5 Binn. 552; 2 Miles, 214, 45; 3 Scam. 201; 9 Mo. 65; 22 Mo. 138; 13 Johns. 240; 1 Ashm. 29; 2 Wheat. 390; 2 Camp. 329.)

SCOTT, Judge, delivered the opinion of the court.

This was a suit on a mechanic's lien. The materials were furnished and the work completed on the 29th of November, 1856. On the 20th of December following, the account was closed by a negotiable note of the defendant, payable to the plaintiffs ninety days after date. On the 25th of February, 1857, before the note was due, the plaintiffs filed in the land court a lien for the materials furnished and labor performed by them for the defendant. The lien was founded on the account for materials and labor, which had been closed by the note dated 20th of December, and payable ninety days after date.

On the following statement of facts the question arises whether the lien of the plaintiffs was extinguished. By the ninth section of the act concerning mechanics' liens, a contractor is required to file his lien within ninety days after the materials are furnished and the work is done; and by the twentieth section of the same act he is required to commence a suit within nine months from the time of filing his account as a lien. We see no reason why the facts detailed should affect the plaintiffs' lien. It does not appear that the defendant was injured in any way, or that any injury could result from taking a note payable at a future day, but within the time within which the suit must be commenced to enforce the lien. Would it be maintained that a note payable on demand or at sight would have such an effect? A note does not extinguish an open account. Upon the production of the note a recovery may be had on the account. The giving of a day for payment was a benefit to the defendant, and it did not injure

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him as it was payable within the time within which the plaintiffs were required by law to bring their suit to enforce the lien. Without the note the plaintiffs might have delayed suit beyond the time of payment given to the defendant. As the note did not extinguish the account, nor the delay injure the defendant, on what ground or principle can it be maintained that the plaintiffs have lost or waived their right to enforce the lien? The giving of the note was at most but a suspension of the right of action. There is a difference between the suspension and the extinction of a cause of action. By giving time for payment, the plaintiffs did not impliedly waive their right to file their lien. The filing of the lien was no step in the bringing of a suit. That was a means only of securing their debt which they might afterwards pursue or abandon at their pleasure.

A witness stated that a receipt was taken for the account; that its language was that the note was taken in settlement of the account. We are of the opinion that there was no error in the court's refusing the instruction asked by the defendant, to the effect, that if the plaintiffs agreed to take defendant's note at ninety days in payment of the demand due them, and did so take the defendant's note, they will find for the defendant. There was no evidence on which to found such an instruction. The cases abundantly show this. (*Glenn v. Smith*, 2 Gill & John. 493; *Muldon v. Whitlock*, 1 Cow. 306; *Tobey v. Barber*, 5 John. 68; *Putnam v. Lewis*, 8 John. 389; *Peters v. Beverly*, 10 Pet. 532.) In suitable cases, where there is evidence that a note was taken in satisfaction of an open account, it is a question to be left to the jury. But on the authority of the cases cited, there was no evidence tending to establish that fact.

The account on which this proceeding was had became due under the general law concerning mechanics' liens, and its provisions have been referred to, as they make no change in the case from what it would have been under the act subsequently, on the 14th February, 1857, enacted for St. Louis

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county. The reference to that act is not intended to imply that this case should have been governed by the general law.

Judgment affirmed, with ten per cent. damages. Judge Ewing concurs. Judge Napton absent.

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BENT'S ADMINISTRATOR, Appellant, v. ST. VRAIN, Respondent.

1. At common law a bastard had no inheritable blood ; he could transmit an estate by inheritance only to the heirs of his body ; if he died without issue and intestate leaving real estate, it escheated to the state.
2. The common law disabilities attaching to bastards with respect to their power of inheriting or transmitting by descent still attach to them in this state except so far as they have been removed by the provision that "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother." (R. C. 1845, p. 422.)
3. This provision does not render a bastard capable of transmitting an estate by descent to his mother or to his illegitimate brothers.
4. One A. died in 1848 in New Mexico, leaving two illegitimate children, B. and C., the children of the same mother. He devised certain real estate in Missouri to said children. B. died leaving said C. and the mother surviving. Letters of administration were taken out upon the estate of A., and on final settlement a sum of money arising from the accruing rents of said real estate remained in the hands of the administrator. *Held*, that B. could transmit his portion of the estate by descent neither to his mother nor to C., his brother ; that B.'s estate escheated to the state.

*Appeal from St. Louis Circuit Court.*

George Bent, of Taos, in New Mexico, died in the year 1848, leaving two illegitimate children, Robert and William Bent. These were his children by one Maria Cruz Padilla, who was at the time of their birth the wife of Jesus Maria Gallegos. George Bent devised certain real estate in St. Louis county, Missouri, to said Robert and William Bent. William Bent died after his father. Previous to the birth of said illegitimate children said Maria Cruz Padilla and her husband Jesus Maria Gallegos had a legitimate child, Mar-

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cellina Gallegos. Letters of administration were taken out in St. Louis county on the estate of said George Bent, and on final settlement in the year 1856 there remained in the hands of the administrator a sum of money arising from the rents of the real estate so devised as stated above. One Ceran St. Vrain—who had previously procured deeds from said Jesus Maria Gallegos and his wife Maria Cruz Padilla and said Marcellina Gallegos, conveying to him all their interest in the estate of said William Bent, and particularly in the real estate above mentioned—moved the probate court to make an order of distribution ordering the administrator to pay to him, St. Vrain, one half of the amount of proceeds or rents of said real estate collected by and remaining in the hands of said administrator. The probate court refused so to order, but directed the said half of the amount in the hands of the administrator to be distributed equally among said Maria Cruz Padilla, Jesus Maria Gallegos, and Marcellina Gallegos. St. Vrain appealed to the circuit court. The circuit court adjudged that St. Vrain, as the assignee of said Maria Cruz Padilla, was entitled to the one-half of the balance in the hands of the administrator, and that Robert Bent and Marcellina Gallegos were neither of them entitled to any part thereof. From this judgment the administrator appealed to the supreme court.

*Jones & Sherman*, for appellant.

I. Robert Bent, though not born in lawful wedlock, is a brother of full blood of William Bent, deceased, and is therefore entitled to a brother's share of William's estate. (R. C. 1845, p. —, § 1.) Brothers are children born of the same stock or parents. Children are none the less brothers and sisters because not born in lawful marriage. They are of the same blood. The word "brothers," as used in the statute, has no reference to legitimacy. The reason for the common law rule does not exist here. Brothers may inherit from brothers though both are illegitimate. The word brother is used in its general sense.

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*Dick*, for respondent.

I. On the death of William Bent, his share went to his mother. She was the sole heir. (5 Whea. 407, 260; 8 Ohio, 289; 6 Blackf. 533; 7 How., Miss., 107; 4 Dess. 444; 4 Dev. 110; 3 Dana, 234; 11 Metc. 294; 8 B. Monr. 606.) The statute legitimates the child only so far as the mother is concerned, and does not create the relation of brothers between children of the same mother. (5 Wheat. 636; 7 How. 112. See 9 Humph. 460; 4 N. J. 431; 4 Ired. 480; 7 Yerg. 615.)

SCOTT, Judge, delivered the opinion of the court.

George Bent was the father of two illegitimate children, Robert and William Bent, born of Maria Cruz Padilla, the wife of Jesus Maria Gallegos. At the time of the birth of Robert and William Bent, Gallegos and his wife cohabited together, and had a legitimate daughter named Marcellina Gallegos. The parties resided in New Mexico. George Bent, being the owner of a piece of land in St. Louis, devised it to his two bastard sons Robert and William Bent. The illegitimacy of Robert and William Bent was admitted. William Bent died after his father, George Bent. After the death of William Bent, his mother, her husband and legitimate daughter conveyed all their interest in his estate to Ceran St. Vrain. Under this state of facts, the court below held that St. Vrain, as the assignee of his mother, was entitled to the whole of William Bent's interest under the will of his father, and that neither Marcellina Gallegos, the legitimate daughter of his mother, nor his brother Robert Bent, could inherit any portion of it.

Kent thus states the common law as to the right of a bastard to inherit: "A bastard, being in the eye of the law *nullius filius*, has no inheritable blood, and is incapable of inheriting as heir, either to his putative father or his mother, or to any one else; nor can he have heirs but of his own body." (2 Kent, 212.) In the case of *Cooley v. Dewey*, 4

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Pick. 93, it was held that at common law the mother of a bastard does not inherit his estate. In the case of *Doe v. Bates and wife*, 8 Black. 533, it was said that, according to the common law, if a bastard die intestate and without issue, leaving real estate, the estate escheats.

Now is there any thing in our statute law which will prevent William Bent's estate from becoming an escheat? The eighth section of our act concerning descents and distributions provides that "bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

The common law making bastards incapable of inheriting or of transmitting inheritance except to their descendants, they are still liable to all those disabilities, except so far as they are removed by the provision above cited. The section of law conferring on bastards the capacity to inherit on the part of the mother is a copy of the act of Virginia, Kentucky and Ohio in relation to the same subject. The statute of Virginia underwent discussion, and was interpreted by the Supreme Court of the United States in the case of *Stephenson's heirs v. Sullivan*, 5 Wheat. 260. In that case it was held, (Judge Washington, who was familiar with the laws of Virginia, delivering the opinion of the court,) that the meaning of the words "inheriting and transmitting inheritance on the part of the mother, in like manner as if they had been lawfully begotten of the mother," was, that bastards should have a capacity to take real property by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate; that this was the uniform meaning of the expression "on the part of the mother or father" when used in reference to the course of descent of real property in the paternal or maternal line.

The case of *Little and others v. Lake*, 8 Ohio, 290, sanctions the constructions given to the Virginia statute by the Supreme Court of the United States and adopts it, although

it was held that another provision of the statute gave the mother a right to inherit from her bastard child. The court said, "the words '*ex parte materna*' have an established legal meaning importing only lineal descendants, and is opposed to the words '*ex linea materna*,' which denote a capacity of both lineal and collateral inheritance. The law does not declare that natural children shall be considered as lawfully born of their mother for all the purposes of inheritance." The case of *Remington v. Lewis*, 8 B. Monr. 606, contains both a legislative and judicial exposition of the statute of Kentucky in relation to bastards, which we have said is a transcript of the statute of this state. That case recognizes the construction put upon the Virginia statute by the Supreme Court of the United States, and maintains that a mother can not inherit from her bastard child.

It is obvious that under the first section of the act concerning descents and distributions the mother can not inherit from her bastard child. That section only contemplates legitimate relations, and the bastard not being capable of inheriting, or of transmitting an inheritance but to his children, he had no capacity but what is expressly given him by statute.

From the best examination we have been enabled to give this question, we have come to the conclusion that the estate of William Bent has escheated to the state.

Judge Ewing concurring, the judgment is reversed. Judge Napton absent.



WARFIELD *et al.*, Respondents, v. LINDELL, Appellant.

1. The character of a disseisin as between tenants in common is different from that of a disseisin as against strangers. This distinction is founded on the presumption that a person, who enters into possession of a tract of land having a title thereto, enters in conformity thereto; *prima facie* the entry of one tenant in common is not adverse to his co-tenants, but in support of the common title; his possession and seisin are the possession and seisin of his co-tenants.

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2. One tenant in common may disseise or oust his co-tenants. To constitute an adverse possession by one tenant in common as against his co-tenants, an actual ouster, or "turning out by the heels," is not necessary; there must, however, be some notorious and unequivocal act asserting an entire ownership.
3. Whether this assertion of an entire ownership must be brought home to the *actual* knowledge of the co-tenants depends upon the character of such act of assertion. If it be a verbal assertion or declaration of entire ownership, it can be of no avail to establish an adverse possession unless brought home to the knowledge of the co-tenants.
4. When, however, the act asserting an entire ownership is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it does not devolve upon the possessor to show that actual notice was given to the co-tenant or to prove a probable actual knowledge on his part; it is sufficient if the act is overt and notorious; if, in such case, the co-tenant is ignorant of his rights, or neglects them, he must bear the consequences.
5. A possession of land by a tenant in common for twenty-six years, and an exclusive receipt by him of the rents and profits, without any account rendered or any demand made, would not of themselves raise a legal presumption of ouster by such tenant in common of his co-tenants.
6. The solemn declarations made by a party to a suit in his petition or answer, are, if pertinent, admissible in evidence against him in behalf of persons not parties to the suit, not by way of estoppel, but by way of admission.

*Appeal from St. Louis Land Court.*

This was an action in the nature of an action of ejectment brought by the plaintiffs as heirs of Nathaniel A. Ware, deceased, on the 14th of January, 1857, to recover possession of an undivided third part of lots numbered 5, 6, 7 and 8, being block No. 225 in the city of St. Louis, containing two hundred and forty feet front on Lewis street and running back to the Mississippi river. Plaintiffs claim title as follows: Smith, Bates and Lisa, in 1817, laid out an addition to the city of St. Louis. Manuel Lisa died in the year 1822. Under a judgment against the executors of Lisa, his interest, an undivided one-third, in all the lots in said addition "which were not sold by said Manuel Lisa," was levied upon by the sheriff and sold and conveyed to Oliver N. Bostwick. The sheriff's deed is dated May 19, 1826. The case of *Lisa v. Lindell*, 21 Mo. 128, decides that this sale

vested the title to the unsold lots in the purchaser. This title passed by mesne conveyances to Nathaniel A. Ware, ancestor of plaintiffs. The title of Ware was acquired by him in 1833.

The defendants, as the evidence showed, passed title to two undivided third parts of said block by virtue of various deeds conveying to him the interests of Bates and Smith. These deeds were executed previous to 1834, *some* previous to 1830.

The defendant in his answer, besides a general denial of the allegations of the petition, and a setting up of the statute of limitations, alleged, in substance, the following facts: That on the 27th of July, 1836, Nathaniel A. Ware, the heirs of Bates, and John Smith, filed their petition for partition against W. Smith and D. Smith, the other heirs of William Smith, setting up that they were tenants in common with the defendants of certain lots in Smith, Bates and Lisa's addition, describing them, being unsold lots in Smith, Bates and Lisa's addition; that the said Ware owned an undivided third thereof under Manuel Lisa, and the heirs of Bates one-third, and the heirs of Smith one-third; and praying partition; that a judgment was had on the 5th of August, 1836, and commissioners appointed, who made partition of certain lots between the parties and recommended others to be sold; that the said commissioners returned a plat with these proceedings, upon which certain lots, including the lots now in controversy, were marked "sold;" that after the report of the commissioners had been approved, said Ware ratified and confirmed the said partition and allotment by a deed dated June 15, 1841, to Mary Lisa. The said answer of defendant also contained the following averments: "That the defendant has been in the actual, open, notorious and continued possession of said lots 5, 6, 7 and 8 for more than twenty-nine years, claiming the same in his own right, to the exclusion of all other persons, and with the full knowledge of said Bostwick, and of said Ware, who have all along during said period acquiesced in the said adverse claim of right; and

the defendant avers, that from the said long adverse possession and claim of title and the recitals in said proceedings in partition, and in said deeds from Ware to Lisa, the jury may be authorized, if in their opinion they deem it proper, to presume a deed from the said Manuel Lisa to this defendant, or to some person through whom this defendant claims."

These portions of the answer were stricken out on motion of the plaintiffs. The defendant offered in evidence the record of the partition proceedings mentioned above. The court excluded it. The court also excluded two deeds between said Ware and Mary Lisa, widow and devisee of Manuel Lisa, one dated June 15, 1841, the other dated June 11, 1846.

The plaintiffs read in evidence the answer of the defendant Lindell in the case of Lisa v. Lindell. This answer was filed in the year 1854. In it the defendant stated as follows: "Defendant will insist and show on the trial and against the claim of plaintiff, Lisa, a title in Nathaniel Ware to the premises claimed by the plaintiff by virtue of sale under judgment and execution against the executors of Manuel Lisa."

The court, at the instance of the plaintiffs, gave the following instructions: "I. If Lisa, Smith and Bates, being co-tenants and owners in fee simple of the tract of land mentioned in the sheriff's deed to Oliver N. Bostwick, read in evidence by plaintiffs, some time in or about the year 1817, laid out said tract into an addition to St. Louis, as mentioned in said deed, and said tract and said addition were well known at the time of the levy and sale by the description given in the sheriff's advertisement or deed, (no plat of said addition having been filed for record up to the time of the execution of said deed,) and if the land in dispute is within said addition, then said deed was effectual to pass to the purchaser, Bostwick, all the interest of said Lisa remaining unsold therein.

"That the interest conveyed is in express terms restricted

to that actually owned or retained by Lisa at the time of his death, without any other or more special designation of the particular lots intended to be sold, can not operate to render the deed void for uncertainty.

"The defendant sets up as a defence, and alleges against the plaintiffs' right to recover, an adverse possession of the whole of said premises described in said petition for a sufficient length of time to make the statute of limitations operate as a bar to this action. In regard to this branch of the defence, the court instructs the jury as follows:

"In law, Lindell's possession either by himself or his lessee, is deemed to be also that of the plaintiffs, until some notorious act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiffs, or those under whom plaintiffs derive title; merely proving that he has been in possession of the whole premises, and has received all the rents thereof, does not establish an adverse possession.

"Whether such acts of ownership amounted to an adverse possession depends on the existence of an intent on his part to oust the said plaintiffs or those under whom said plaintiffs claim from the premises, and their knowledge of their having been done with that intent.

"If Lindell claimed the whole premises under a conveyance or conveyances purporting to convey the whole, or the interest therein now sued for in this action, his possession of the whole was adverse to the plaintiffs, and those under whom they derive title, from its commencement under said claim.

"If his claim of adverse possession is not based on such a conveyance, but on possession and acts of ownership done by him, then he must prove that such acts were done with the intent to oust the plaintiffs, and those under whom they derive title, from the premises, and that the acts and intents were brought home to the knowledge of said plaintiffs, or those under whom they claim title; and it is only from the time of such knowledge that said acts of ownership are to be regarded as adverse.

"In order, therefore, to enable the defendants to avail

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themselves of the statute of limitations as a bar to this action, the jury must be satisfied from the evidence that for twenty years next prior to the commencement of this suit said Lindell was, without interruption or intermission, in possession of the premises sued for, and that his possession during the whole of that time was adverse to the plaintiffs and those under whom plaintiffs claim title, either because held under a conveyance purporting to convey the title to the whole, or of the interest therein, now sued for in this action, or because, during all that time, he notoriously and to the knowledge of plaintiffs or those under whom plaintiffs derive title, claimed the whole adversely to and exclusive of them."

The defendant asked and the court refused the following instructions: "If the jury find from the evidence that Peter Lindell entered into the possession of the premises in question, supposing himself to be the co-tenant of Mrs. Mary Lisa, and held for himself and Mrs. Mary Lisa, to the exclusion of Martin Thomas and Thomas Ingram, and adversely to them, his possession can not be held by the jury to have been for the benefit of the plaintiffs, or those through whom plaintiffs claim.

"If the jury find from the evidence that Peter Lindell, in person or by his tenants, agent or employees, entered upon the premises in question as early as 1830 or 1831, and that he has had and held notorious, open, continuous and actual possession of said premises, in person or by his tenants or agents, from either of said years until the commencement of this suit, claiming to own the same in his own right to the exclusion of all other persons, then the jury will find for the defendant.

"If the jury find from the evidence that Peter Lindell, in person or by his tenants, agent or workmen, has had and held open, notorious, continuous and actual possession of the premises in question for twenty-six years next before the commencement of this suit, claiming to own the said premises to the exclusion of all other persons, then the jury will find for the defendant."

*B. A. Hill*, for appellant.

I. The plaintiffs, as heirs at law of Ware, are estopped by the recitals in the record of partition between Ware and the heirs of Bates and Smith, by the acts of the parties claiming under the partition, and by the deeds between Ware and Lisa confirming said partition, from denying that lots 5, 6, 7 and 8 were sold by Smith, Bates and Lisa. (*Carondelet v. McPherson*, 20 Mo. —.) Lindell was a commissioner in said partition. The sheriff's sale to Bostwick was of the unsold lots. The parties knew that these lots were marked "sold" in the report of commissioners. The court erred in striking out the portion of the answer setting up this defence; so also in striking out that portion in which the facts are set forth authorizing the presumption of a deed. (*Dessaunier v. Murphy*, 22 Mo. 95.)

II. The petition for partition was competent evidence of the facts therein stated, although not sworn to. The deeds of Ware to Lisa are as satisfactory proof of the statements in the petition as the oath of the party would have been. (See 3 Greenl. Ev. § 274, 527; 3 Pick. 40; 28 Ala. 110; 33 Maine, 370; 3 Greenl. 316.) The deeds from Ware to Lisa should have been admitted. (6 M. & W. 668; 1 Greenl. Ev. § 211; 5 Carr. & Pay. 542; 8 East, 493; 2 Metc. 368; 2 Watts & S. 411; 11 Shepl. 139; 17 Conn. 441.) The court erred in its ruling upon the statute of limitations, ouster and adverse possession. The court held that the ouster must be brought home to the knowledge of the plaintiffs or those under whom they claim; that no adverse possession, however notorious, will do; and that knowledge of plaintiffs that it was adverse must be proven to the jury; that the jury can not infer or presume knowledge from its notoriety; and that knowledge will not do unless it be also shown that the adverse possession was notorious. In other words, an ouster can not be presumed at all, if the title papers show that defendant was a tenant in common with those under whom plaintiff claims. Sole possession implies adverse possession. (See Co. Litt. 243; 1 Ld. Raym. 310; 2 Ld. Raym.

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830; 2 Salk. 423; 1 Salk. 390; 1 Atk. 493; 5 Burr. 2008; Doe v. Prosser, Cowp. 217; 1 East, 568; 4 Dev. 223; 5 Watts, 149; 10 S. & R. 182; Law v. Patterson, 1 W. & S. 191; 9 Watts, 336; 2 W. & S. 299; Jackson v. Whitbeck, 6 Cow. 632; 1 Caines, 90; Busb. 467; 2 Jones, Eq. 433; 4 Dev. 290; 15 Ala. 369; 18 Ala. 55; 30 Penn. 507; 1 Pick. 116; 5 Day, 188; 6 Dana, 426.) The possession of one tenant in common, if exclusive and without admission of the others' right, will, if continued for a great number of years—twenty-one—raise a presumption of ouster, which is a presumption of law. It is not necessary that there should be "notice." (Lodge v. Patterson, 3 Watts, 74; 2 Jones, 433; 10 S. & R. 182; Law v. Patterson, 1 W. & S. 191.) Sole possession of one tenant in common, and sole perception of the profits, if continued for a number of years, the period varying under the decisions from twenty, twenty-one and more years up to thirty-six, will authorize the court to submit it to the jury as a question of fact to presume an ouster; and if such possession be continued for a still larger number of years, say forty or fifty years, the law will presume an ouster upon the mere fact of such exclusive possession and perception of profits being proved. But none of the cases make express notice or knowledge of the plaintiff, either of his rights or of the fact that he has been ousted, essential in order to authorize the jury to presume an ouster, or to presume it as a matter of law. (2 W. & S. 299; 4 Dev. 290; 5 Watts, 149; 1 Caines, 90; 4 Mass. 330; 3 Mete. 99; 6 Pick. 172.) Disseisin does not require notice; the question of intent to oust a co-tenant is not dependent upon any notice of that intent to the owner. The intent is proven by notorious acts of exclusive possession. 2 Greenl. 275; 1 Mass. 483.) The cases in 3 Mete. 101; 3 Pet. 51; 7 Wheat. 121; 9 Cow. 530; 14 B. Monr. 127; 4 Wis. 565; 3 Hawks, 232; 1 Kern. 115, which may be cited in support of the instructions of the court in this case, do not support the ruling of the court as to the notice of the disseisin being brought home to the knowledge of the plaintiffs. The

evidence in this case as to the character of Mr. Lindell's possession is of the most conclusive character.

*Shepley*, for respondents.

I. The proceedings in partition in which Ware was a party was not competent testimony, and the court properly struck out all relating to it from the answer, and rejected it when offered in evidence. It is no evidence that Ware did not own the land that he did not include it in a proceeding for partition. The recitals in the petition can not be invoked to support a title acquired before the partition. This was a proceeding for partition of lots owned or alleged to be owned by Ware and the heirs of Smith and Bates, as tenants in common. Previous to its institution Lindell had acquired the interest of Smith and probably that of Bates in the lots in controversy, so that these lots could not be included in any proceedings between Ware and those heirs. The petition very properly spoke of the lots embraced in the partition as lots not sold. The statement was literally true. The lots in controversy in this suit were all sold by Lisa to Bostwick, and by Bates and Smith to Lindell. The deed of the sheriff to Bostwick vested in him all the title that Manuel Lisa had to the lots in controversy. (21 Mo. 127.) The answer of Lindell to the petition in the case of *Lisa v. Lindell* was decisive that he had no right or title to the third owned by Ware. It was in relation to the lots in controversy.

II. No possession, however long, of a tenant in common will bar his co-tenant, unless such possession was taken and continued with the intent to bar such tenant, and such acts of possession and intent were brought home to the knowledge of the plaintiffs. An ouster or disseisin is not indeed to be presumed from the mere fact of sole possession, but it may be proved by such possession accompanied with a notorious claim of exclusive right. The receipt of rent for twenty-six years is not an ouster. There must be actual notice. The intent to oust must be proven. An exclusive possession of twenty-seven years is not adverse as to tenants

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in common and is not sufficient to authorize presumption of ouster. There must be a denial of title. There was no adverse possession, for the defendant, in his answer in *Lisa v. Lindell*, filed in 1854, admitted our title and that he held as co-tenant with us. (4 Mass. 326; 7 Wheat. 120; 3 How. 689; 13 Penn. 276; 5 Burr. 2604; 8 Mo. 276; 3 S. & R. 381; 4 Day, 473; 3 Mete. 99; 3 Watts, 77; 9 Cow. 530; 5 Cow. 483; 4 Coms. 61; 25 Maine, 435; 24 Wend. 221; 3 Pet. 51; 14 B. Monr. 127; 38 Maine, 213; 1 Kern. 115; Cowp. 217; 11 East, 49; 6 Cow. 632; 6 Dana, 432.)

NAPTON, Judge, delivered the opinion of the court.

The statute of limitations having been the main ground of defence at the trial of this case, the instructions on that subject constitute the principal point for our consideration.

There is an admitted distinction recognized in the cases on the subject between the character of a disseisin as against strangers and between tenants in common. This distinction is founded on the presumption that a person, who enters into possession of a tract of land having a title thereto, enters in conformity to that title. No presumption will be entertained that a man means to do an unlawful act; and if the title he has gives him a right to enter on the land, his entry is attributed to that title. If, then, one tenant in common enters upon the land, his entry and possession are not esteemed *prima facie* adverse to his co-tenants, but in support of the common title; and his possession and seisin is the possession and seisin of the others. (Cruise, Dig. tit. 20, § 14.)

That one tenant in common may disseise or oust the others is also very well established; but it is not so easy to determine from the authorities what acts will amount to an ouster. This difficulty does not seem to arise from any contradiction or confusion in the principles of law decided upon this subject, but in the application of admitted principles to the facts of each particular case. An actual ouster, or "turning out by the heels," as some of the judges have termed it,

is not necessary ; but the act or declaration, which constitutes an ouster, must be unequivocal and notorious ; and as the character of the act must necessarily depend very much on the intent with which it is done, its consequences and effects in producing an adverse possession will also vary with the circumstances accompanying it calculated to explain that intent.

To constitute an adverse possession of one tenant in common against his co-tenants, there must be some notorious act asserting an entire ownership. It is further said in some cases that this act must be brought home to the knowledge of the co-tenant. This, we suppose, depends upon the nature of the act. If it consists altogether of a mere verbal assertion of entire ownership, such an assertion could not with any propriety be regarded as an act of adverse possession of which the co-tenant was bound to take notice, unless made to him or communicated to him. A declaration to a mere stranger amounts to nothing, unless that declaration is brought to the knowledge of the co-tenant. (But when the act is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it is not believed to be necessary that any positive notice should be given to the co-tenant, or that it devolves upon the possessor to prove a probable actual knowledge on the part of the co-tenant. It is sufficient that the act itself is *overt, notorious* ; and if the co-tenant is ignorant of his rights or neglects them, he must bear the consequences.)

In the case of *Clymer's Lessee v. Dawkins*, 3 How. 689, Judge Story expresses a view of the law of notice to co-tenants, which seems to have been adopted by the court below in the trial of this case. "The entry and possession of one tenant in common," says Judge Story, "of and into the land held in common is ordinarily deemed the entry and possession of all the tenants ; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse

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possession by the party so entering into possession is brought home to the knowledge or notice of the others." "Such a notorious ouster or adverse possession may be by any overt act *in pais* of which the other tenants have due notice, or by the assertion of a several and distinct claim to an entirety of the whole land, which, in contemplation of law, is known to the other tenants." In the case of McClung v. Ross, 5 Wheat. —, which is referred to by Judge Story, the same court had said: "That one tenant in common may oust another and hold in severalty is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." The observations of Judge Story, in Climer's Lessee v. Dawkins, were made *arguendo*, as the facts of the case did not present any question of notice, and the judgment of the court was for the defendant in possession. The adverse possession claimed in the case was of such a character as implied notice; and there was therefore no question of express notice in the case.

In the case of Lodge v. Patterson, the supreme court of Pennsylvania seem to explain the law relative to notice in cases of this character with more accuracy. (The character of adverse possession is given, not by proving notice to parties interested, but by the nature of the acts done by the party. There must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind. To constitute a disseisin, it was never held to be requisite that notice should be sent to the disseisor, or that it must be proved that he had knowledge of the entry and ouster committed on his land. The open act of entry, with the declared intent to disseise, constitute the disseisin.")

These opinions may seem to conflict, but when the facts of each case are looked to, it will seem that they are essentially different; and the attention of the court is of course directed to the law as applicable to the state of facts presented. In the case of Lodge v. Patterson, the party sued, who was one

of several co-heirs, put up the whole land and bought it and entered, claiming the whole. The act of adverse possession was a public one, of which every one having an interest or claiming an interest in the land was bound to take notice; and it was totally irreconcilable with the admission of the co-tenancy of another.

× In this case, if the declaration of the defendant to one of the witnesses, that he claimed the whole block, or was the sole owner, is the only act relied on to make the possession and retention of the rents and profits an ouster of the plaintiffs or those under whom they claim, it was proper to tell the jury that such declarations, to be available as acts of adverse possession, must be made to the co-tenant, or must be brought home to his knowledge. If other acts are relied on, their notoriety would be a matter for the jury. As the facts of the case were developed on the trial, it was apparent that they presented mainly the question whether a possession for twenty-six years, and a receipt of the rents and profits, without any account rendered, and without any demand made, would of themselves raise a legal presumption of ouster, or would authorize a court to leave the question to the jury.

In England, an exclusive possession of thirty-six years was allowed to go to the jury as evidence of an ouster, and the jury found a verdict upon this bare fact, in the absence of any explanatory proof on either side. Lord Mansfield said, when the point came up for review in the King's Bench: "It is a possession of near forty years, which is more than quadruple the time given by the statute for tenants in common to bring their action of account, if they think proper, namely, six years; but in this case no evidence whatever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them or in those under whom they would now set up a right; therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that

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they did right in so doing." (Doe v. Prosser, Cowp. 217.) This is as far as any case in England has gone.

In New York an exclusive possession of twenty-seven years was held insufficient to authorize the presumption of an ouster, although in the intermediate time there had been an actual resistance to the plaintiff's entry and claim. (Northrop v. Wright, 24 Wend. 221.)

In Pennsylvania it has been held that a jury may presume an ouster from an exclusive actual possession by a tenant in common for the period fixed by their statute of limitations. (Law v. Patterson, 1 W. & S. 186; Bolton v. Hamilton, 2 W. & S. 299; Galbreath v. Galbreath, 5 Watts, 147.) An examination of the facts, however, in the cases where this doctrine is enunciated in Pennsylvania will show that there were in each case circumstances attending the facts of possession, which would fully authorize the inference of adverse possession. The case of Law v. Patterson may be selected as the strongest case reported in support of the doctrine that mere possession and retention of profits, &c., for twenty-one years will justify an inference of disseisin. That was a case where the land was bought and paid for by the defendant in possession, and a title taken in the name of himself and another, who was a partner in mercantile business with him. The defendant had taken exclusive possession; had improved and built upon the land; had leased the whole premises for seven years; and at the expiration of that term had relet the premises for another long term, reserving rent to himself, and actually receiving all the rents and profits of the place for upwards of twenty-one years, without any demand made by the partner in whose name the purchase originally stood; and the partner lived all the while in the immediate neighborhood of the defendant, and had advanced no part of the purchase money. There could be no doubt about notice in the case, for every thing occurred, as the court observed, directly "under the eye of the plaintiff." But the court, in Wilson v. Collinshan, 1 Harr. 277, say, speaking of the case of Law v. Patterson: "The mere exclusive receipt of the

profits by one tenant in common for twenty-one years is not deemed sufficient evidence on which to found the legal presumption of ouster of his co-tenant. It only raises a natural presumption, and is evidence to go to the jury to produce conviction, *in connection with other facts.*"

The facts, which have usually gone to make out a case of adverse possession, have been such as a refusal to the co-tenant to permit his participation in the profits or his entry, a denial of his title, claiming under a defective deed for the entirety, purchasing the co-tenant's title at a sheriff's sale and an exclusive claim under it, or a conveyance of the whole by deed and an entry by the grantee under the deed, (2 Cruise Dig. tit. W. S. 14, note 3,) and, we may add, following the case of *Law v. Patterson*, putting up improvements without consultation with the co-tenant and under his observation, and taking the entire profits without objection from him.

In North Carolina it appears to be held that twenty years' sole possession alone will constitute a bar. (*Thomas v. Garvan*, 4 Dev. 225; *Cloud v. Webb*, 4 Dev. 290.) But this doctrine would seem to lose sight of any distinction between the facts necessary to constitute an adverse possession in tenancies in common and any other case of adverse possession—a doctrine which may find some recommendation in principles of public policy, but which certainly has not yet been generally prevalent.

In Massachusetts the courts maintain the view presented by Judge Story, in *Prescott v. Nevers*, 4 Mason, 330, and in *Clymer v. Dawkins*, 3 How. 270. The entry of a tenant in common upon land, and taking the whole rents and profits without paying any share over to the co-tenant, is not regarded as an ouster; but an entry under a claim to the whole is considered adverse; and therefore, in the particular case referred to, a purchase of the entirety from an adverse claimant to the cotenant, although the title was invalid, was held to make the possession hostile and amount to an ouster. (*Parker v. Prop., &c.*, 3 Metc. 99.)

Apart from any deduction to be drawn from the record

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evidence offered in this case, the proof was, that the defendant went into possession of the block of ground in controversy in about the year 1830, and has continued in exclusive possession ever since; that there was an old building on the lot at the time, formerly used as a mill, but suffered to go into disuse for that purpose, and used only as a storehouse or warehouse by the defendant or his tenants; that he has quarried rock on different parts of the block through his workmen or tenants; that there are on the ground some wooden buildings or sheds for the workmen who quarried there; that the premises were leased by Lindell in 1847 to Belcher for a sum about sufficient to pay the taxes; that the premises are now leased for the taxes. It is apparent that the premises are in the same condition now that they were in 1830. No improvements or buildings have been put upon the block. It does not appear that any profits have been derived from it. In short, so far as the class of evidence to which we now refer is concerned, there is nothing in the case except a mere possession taken twenty-six years before suit brought, and an exclusive perception of all the profits which may have been derived from that possession. The defendant has done nothing in connection with the lots which any owner of two-thirds or one-half of them might not well have done for the protection of his own interest, without any design of ousting the owner of the remaining interest.

But there are other circumstances elicited in the proof offered and rejected on the trial, which, if competent evidence, would undoubtedly have a significant bearing on the question at issue, and a controlling influence in their settlement, if not counterbalanced by proofs from the other side equally significant. The partition suit in 1836, between Ware—from whom the plaintiffs derive title—and the heirs of Bates and Smith, ought not, in our opinion, to have been excluded from the jury. The petition in that case averred that this block of ground was sold by Lisa in his lifetime. This can not be regarded as an estoppel, because, as a record, the parties are not the same; and, as a fact *in pais*, there is

no proof that the defendant's conduct was in any way influenced by the assertion of Ware. But where a party, who has every motive, and may be supposed to possess every opportunity requisite to investigate the extent of his own title, deliberately asserts that he has none to a specific piece of ground, it is certainly a circumstance entitled to consideration, when he subsequently brings a suit for the same land, after the lapse of twenty or more years. This assertion is confirmed by the plat which is found upon the record accompanying the report of the commissioners, in which the lots sued for are marked "sold;" and it is further strengthened by the deeds executed by Ware and Mrs. Lisa, upon a compromise of their claims to the interest of Manuel Lisa. It is true that this assertion that the lots were sold by the original owners of the tract—Lisa, Bates and Smith—in their lives, is contradicted, so far as Smith's interest is concerned, by the title produced on the part of the defendant to that interest, a title obtained by a partition among the heirs of Smith long after his death; and it is also true that, even if the lots were unsold, they could not have formed a subject for partition between Ware and the heirs of Bates and Smith in 1836, as the two latter titles had undoubtedly at that time become vested in the defendant. But notwithstanding these circumstances, which may detract somewhat from the force of the admission, the petition of Ware is undoubtedly an assertion that to the lots numbered 5, 6, 7 and 8, now sued for, he had no title. He did not set up any title except such as was derived from the sale to Bostwick; and that title only extended to the unsold lots. If the lots now sued for were sold in Lisa's lifetime, then Bostwick acquired no title to them by his purchase at the execution against Lisa's estate. We do not consider this assertion as conclusive as an estoppel; for it may be explained to have been made under a mistake or in ignorance of the facts; but it is legitimate evidence upon the question at issue, and proper for the consideration of the jury. It would certainly, if unexplained and not rebutted, form good ground for leaving a jury to presume a deed, after

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the lapse of twenty-six years and a continuous possession in the defendant during this period.

On the other hand, it appears that as late as 1853, a suit was instituted by Mrs. Lisa for the same interest now sued for by the plaintiffs; and in that suit, the defendant in his answer insisted "that he would show on the trial, and against the claim of Lisa, a title in N. Ware [from whom the present plaintiffs claim] to the premises claimed by the plaintiffs, by virtue of a sale under judgment and execution against the executors of Mr. Lisa."

In cases of long continued uninterrupted possession, juries have been authorized to presume conveyances in support of the title of the possessor. "Presumptions of this nature," it was observed by Judge Story, in *Ricord v. Williams*, 7 Whea. 109, "are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to or an admission of an existing title in the party in possession. They may therefore be encountered and rebutted by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the nonexistence of a grant."

In addition to the fact that the possession of the defendant in this case was entirely consistent with the title to two-thirds of the block which he is conceded to have, there would seem to be great embarrassment in allowing a presumption of a fact which is virtually disavowed in the defendant's answer in a suit involving the matter now in controversy. But as the plaintiffs, or those from whom they claim title, made quite as formal a disclaimer of title on their part in the partition suit in 1836, the evidence on each side should have gone to the jury for what it was worth. If the deduction should be that both statements are true, and that neither party has a title to the interest now sued for, the result, of

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course, would be to leave the defendant in possession. It is, however, the province of the jury to pass upon the facts. We will not be understood as passing any opinion upon them, and we have only alluded to them so far as to enable our views to be understood in reference to the various aspects which they seemed to present.

As the record of the suit in partition in 1836 was excluded from the consideration of the jury, the judgment will be reversed and the cause remanded for trial. The other judges concur.



SMITH *et al.*, Appellants, v. ST. LOUIS PUBLIC SCHOOLS *et al.*,  
Respondents.

1. The principle upon which the right to alluvion is placed by the civil law—which is essentially the same in this respect as the Spanish and French law, and also the English common law—is, that he who bears the burdens of an acquisition is entitled to its incidental advantages; consequently, that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be annexed to it. This rule is inapplicable to what are termed limited fields, *agri limitati*; that is, such as have a definite fixed boundary other than the river, such as the streets of a town or city.
2. A lot in a town or village may be entitled to riparian privileges if bounded on a river; yet if, as originally granted, it were bounded or limited on all sides by streets, the owner thereof would not become a riparian proprietor and entitled to alluvion by reason of the fact that the original concession or grant, besides the street, also called for the river in front.
3. In the year 1766, the French commandant at the post of St. Louis granted and conceded to Pierre François DeVolsey a lot of ground in said village, of two hundred and forty feet front on the side of the Mississippi and fronting thereto (*du côté du Mississipi et y faisant face*), by three hundred feet in depth on the side of the woods (*du côté du bois*), having said front upon the grand (or main) street (*tenant la dite face et par devant la grande rue*), in the rear another main street (*une autre grande rue*), &c. The concession was bounded on the sides also by streets. *Held*, that the concession did not constitute the grantee a riparian proprietor; that the concession was bounded by the street in front and not by the river; that neither he nor his grantees would be entitled to alluvion formed in front of the street.

*Appeal from St. Louis Land Court.*

This was an action brought to recover possession of the north half of block No. 854 in the city of St. Louis. The defendants are the Board of President and Directors of the St. Louis Public Schools and the tenants under said board. Said block is bounded as follows: west by Main street, north by Cedar street, east by Front street, or the levee, and south by Mulberry street. In support of their title the plaintiffs adduced the following evidence:

1st. A certificate of confirmation issued by Recorder Hunt under the act of Congress of May 26, 1824. This was issued in the name of Auguste Chouteau, and the land confirmed was described as "bounded on the east by Front street or the Mississippi, leaving a road between it and the lost, west by Church street, south by south I street, and north by south H street." South H street is now known as Cedar street, south I street as Mulberry street. The plaintiffs offered in connection with this certificate Hunt's minutes of testimony, but the court excluded them on the objection of defendants. These minutes were, however, afterwards introduced by defendants.

2d. A concession made to DeVolsey in 1766. This concession is as follows: "Aujourd'hui, 15 Août, 1766, sur la demande de M. Pierre François DeVolsey, officier dans les troupes de la marine, qui désire s'établir au poste St. Louis, nous lui avons concédé et concédons, à titre de pleine propriété, un terrain ou emplacement pour se bâtir et y faire tous autres bâtimens de commodité, de 240 pieds de large du côté du Mississippi et y faisant face, sur 300 pieds de profondeur du côté du bois, tenant la dite face et par devant la grande rue, par derrière sur la profondeur à une autre grande rue, d'un côté à une autre grande rue de traverse venant du Mississippi, qui limite ces terrains des Sieurs Blondeau et Lami, et de l'autre côté du nord à une autre rue de traverse venant du Mississippi, pour en jouir par le dit Sieur DeVolsey ou ses ayant cause en pleine propriété, sans pré-

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judice au charges publiques et autres qu'il plaira à sa majesté d'y imposer, defendant à qui que ce soit de le troubler dans sa concession à peine de désobéissance. Fait à St. Louis dit jour et an. [Signed] St. Ange. Labuxiere."

The above concession was accompanied by the following translation: "This day, 15th August, 1766, upon the request of Mr. Pierre François DeVolsey, officer in the marine corps, who desires to settle at the post of St. Louis, we have granted and do grant him in full title a lot or dwelling place, where to make other buildings necessary, of 240 feet in front toward (côté) the Mississippi, and fronting thereto, by 300 feet in depth toward (du côté) the woods, bounding the said front upon the grand (or main) street, on the rear by its depth another main street, on one side another cross street running to the Mississippi which bounds the lots of Messrs. Blondeau and Lami, and on the other side to the north another cross street running to the Mississippi, to be enjoyed by the said DeVolsey and his assigns in full property, without prejudice to the public charges and others which it may please his majesty to impose, forbidding whom it may concern to interfere with this concession. Done at St. Louis the said day and year. [Signed] St. Ange. Labuxiere."

3d. Documentary evidence showing that said block was confirmed to DeVolsey's representatives by the act of Congress of April 29, 1816.

4th. Plaintiffs introduced evidence showing title in themselves under Auguste Chouteau to the north half of said block embraced in said concession to DeVolsey; also showing the situation and boundaries of said concession as possessed and occupied by Auguste Chouteau for many years. It was bounded on the south by Mulberry street, on the west by Second or Church street, and on the north by Cedar street. The land in controversy lies immediately east of the north half of the block No. 42 embraced in said concession and upon the eastern side of Main street. The plaintiffs introduced evidence to show that until a recent period the Mississippi river ran as far west as Main street; that the

western bank of the river intersected said block No. 42; that in the year 1814, a snag lodging in the river, a bar commenced forming in the river opposite the city, which gradually became an island; that there was a slough west of this bar through which boats passed at high stages of water, the banks of said slough lying west of Main street and of the land in controversy; that the great floods of 1844 and 1851 caused the filling up of said slough; that previous to the year 1851, said Main street did not run as far south as said block 42, but that said street is now situated where the river formerly ran; that previous to the extension by the city of St. Louis of Main street in front of said block 42, there was a path there passable for men and horses only and not wagons; that this path was along the bank, and previous to the introduction of steamboats was used as a tow-path.

The defendants introduced evidence showing that on the 9th of November, 1809, the town of St. Louis was incorporated; that its boundaries included the land in controversy; that on the 9th of June, 1810, the board of commissioners confirmed a lot of 240 feet by 300 feet, embraced in the DeVolsey concession, to Auguste Chouteau, as DeVolsey's representative, and ordered "that the same be surveyed conformably to the possession;" that on the 13th of December, 1811, the commissioners issued their certificate in said Chouteau's favor; the same was recommended for confirmation by Recorder Bates, and confirmed by act of April 29, 1816, to DeVolsey's representatives, 240 feet by 300 feet, to be surveyed; that Recorder Hunt issued his certificate of confirmation to Auguste Chouteau for said block of 240 feet by 300, bounding it as above set forth. The defendants also introduced United States survey No. 173 of St. Louis lands. This was a survey made in 1835 of the three confirmations above set forth of the DeVolsey concession. By this survey the concession and confirmation were limited to block No. 42, and bounded east on First or Main street, and west on Second street. This survey was approved in 1850. The defendants also introduced in evidence, against the objection

of plaintiffs, a plat of St. Louis known as Chouteau's plat. This was not an official survey, but was admitted as evidence against plaintiffs claiming under Chouteau. The defendants also showed an assignment and designation of the land in controversy for the use of schools. This assignment and survey embraced the whole block immediately east of block 42; it embraced the land in controversy; it was made in 1844.

The court, on motion of defendants, gave the following instruction to the jury: "Under the evidence offered by the parties respectively, the plaintiffs are not entitled to recover, and the jury is therefore instructed to find for the defendants."

The plaintiffs asked and the court refused the following instructions: "1. If the jury believe from the testimony that before the 20th of December, 1803, Auguste Chouteau and those under whom he claimed had inhabited, cultivated or possessed block 42 in the town of St. Louis, claiming the front on the Mississippi river, and that he conveyed the north half of said block, bounding it east by said river, to his daughter Emilie Smith, and that the plaintiffs are the children and only heirs of said Emilie Smith, and that the land sued for has been formed by accretion from the deposits of the river added to said north half of said block 42 since the year 1844, then the plaintiffs, as owners of the shore, are entitled to such accretions as riparian owners, and the jury will find for the plaintiffs. 2. If there never was in actual fact any street in front of said block 42 laid out and used prior to 1851, actually existing and known as Main street, then the call for a street, road or tow will not deprive the plaintiffs of their river front, with its claim to the alluvial deposits and accretions from the river. 3. Notwithstanding a street known as Main street may have ran between said block No. 42 and the water's edge, the existence of said street would not have deprived the plaintiffs and those under whom they claim of the right to the accretions made by the river in front of the street and said block."

*Whittelsey*, for appellants.

I. The court erred in refusing to admit Hunt's minutes. Although not testimony to show title, yet there was good evidence to show the claim. So also the court erred in refusing to admit DeWard's copy of Paul's map, the original being lost, and it being shown to be a correct plat of an official survey of the city showing the locations of streets and lots. (*New Orleans v. United States*, 10 Pet. 662, 712.) What is called Chouteau's plat was not admissible in evidence. It was not based upon actual survey, not official, not correct.

II. The plaintiffs are riparian proprietors, and entitled to alluvion. The claim presented was for a lot bounded east by Front street or the Mississippi, leaving a road between it and the lot, and for this lot a certificate was issued. Front street and Main street are not different names for the same street, but Front street is what is now known as the levee, and lies in front of the lot sued for. It is evident from the testimony that Chouteau claimed a river front, while he admitted the subjection of the land to the public servitudes, tow-path, rights of navigation, &c. (4 Mo. 343; 3 Scam. 510.) The most notorious object called for as a boundary should control. (4 Kent, Com. 466; 11 Conn. 60; *Municipality No. 2 v. Cotton Press*, 18 La. 123.) The lot had a river front under the French and Spanish governments, with a right to alluvion. (6 Martin, 19; 10 Pet. 662.) The confirmation conferred the Spanish title as it then existed. (27 Mo. 89.) The concession fronted on the river. (24 Wend. 451; 11 N. H. 531; 18 How. 157; 1 Gill & Jo. 249; 8 Gilm. 548; 2 Wis. 308.) No survey could take away this right. The grants of St. Ange and Labuxiere were always recognized by the Spanish authorities. A boundary by a river passes a riparian estate, and in rivers not navigable at common law the title passes to the centre of the stream. (3 Kent, Com. 429; 7 Mass. 496; 14 Mass. 149; 6 Cow. 544; 5 Wend. 423; 19 Pick. 191; 5 Wheat. 374; 3 Ohio, 495; 5 H. & Jo. 195; 3 Sm. & M. 366; 13 How. 381.)

III. The plaintiffs' grant, claim and confirmation of a river boundary must pass the right to go at least to low water-mark and to follow the receding shore. They are owners of the shore, and as such own the shore. (10 Pet. 662; 1 Gill & Jo. 249; 5 Wheat. 380; 3 S. & M. 366, 6 Mar. 19; 11 Ohio, 138; 3 Ohio, 496; 8 Port. 9; 3 Scam. 510 Code; Civile, § 556, 557, 561; 8 Pothier, 179, § 157; 1 Mor. & Carl. Part. 346; Inst. 2, 15; Dig. 43, 12, 11; 18 How. 150, 157; Coop. Just. Inst. 68; Dig. 41, 38; Ventr. 188; Schulz Aq. R. 137; 7 Bing. 163; 3 B. & C. 90; 5 B. & Ald. 268; 10 Price, 350; 3 T. R. 253; 4 B. & C. 598; 5 Eng. L. & Eq. R. 258; 8 Am. L. Rep. 219; 4 La. Ann. 30; 5 id. 36; 8 Rob. 211; 18 Louis. 122, 280.) By the common law the waters and soil under the waters of rivers above the flow of the tide were private property. In the United States this rule applies. If the waters are capable of navigation for vessels, they are public highways. (31 Maine, 9; 8 Barb. 239; 2 Swan, 9; 3 Zab. 624; 1 Penn. 105; 14 B. Monr. 367; 3 Mich. 519; 19 Pick. 191; 7 Conn. 186; 20 Wend. 111; 22 id. 425; 1 Whart. 124; 2 id. 108; 9 Serg. & R. 26; 1 Yeats, 16; 28 Penn. 206; 26 Penn. 51; 6 Hump. 367; 18 Georg. 539; 13 How. 381; 6 Georg. 139; 2 Port. 436; 8 Port. 9; 2 Ohio, 307; 2 McLean, 376; 3 Ohio, 495; 1 Hawks, 56; 8 La. Ann. 219.) The Mississippi river is now navigable, so far as the rights of riparian owners are concerned. (See 1 Land Laws, 23, 54, 56, 107, 98, 185, 187, 195, 202, 216, 286, 310; 3 How. 212; 9 How. 471; 1 R. C. 1855, p. 50, 81; 8 Porter, 9; 9 How. 471; 16 Mo. 124; 8 Gill. 548; 1 Partidas, 33; 1 Terr. Laws, p. 948; R. C. 1825, p. 587; R. C. 1835, p. 406; R. C. 1845, p. 744; R. C. 1855, p. 1081; 4 Mo. 467; 6 Mo. 225; 7 Mo. 307; 24 Mo. 273.) See statutes relating to towns and cities, showing that the banks of rivers are private property. (1 Terr. Laws, 184, R. C. 1825, p. 764; 1835, p. 600; Sess. Acts, 1839, p. 159; Sess. Acts, 1841, p. 132; Sess. Acts, 1843, p. 16, 117.) See ordinances of St. Louis, Nos. 1135, 1146, 1673, 1751, 1752, 2263, 2359, 2582, 2596, 2751, 2967. The

statutes of Missouri show that this state has adopted the rule that rivers navigable in fact are common highways, subject to public uses, but that the riparian owner has property in the banks and even the beds of the watercourses. The question of state sovereignty has, however, nothing to do with this case, for the alluvion belongs to the riparian owner in any case. The grants were made before Missouri became a state. (3 How. 212; 9 How. 478.)

IV. The reservation of a road or tow in front of the lot did not prevent the grant and confirmation from passing a riparian right and the claim to accretion and alluvion. (*Morgan v. Livingston*, 6 Mart. 19; 8 Part. 9; 18 Louis. 213.)

V. Under the French and Spanish governments New Orleans was the only city that had an existence as such by legal authority, and out of that city all estates and grants were rural. (6 Mart. 19; 10 Pet. 662; 5 Louis. 423; 18 Louis. 213.) There is no evidence of any official survey of St. Louis prior to the survey made under the authority of the city in 1823. Many of the Spanish grants of lots in St. Louis called for the river as a boundary. These embraced nearly the whole front of the town. The grants were rural; the town was not laid out with any quay or road in front. The grants were intended to pass river fronts. Urban property, however, is entitled to alluvion, if the proprietors are riparian.

VI. The incorporation of St. Louis in 1809, and the fact that this lot was within the limits of the town thus incorporated, can not take away the right to alluvion. In fact there was no street in front of this lot laid out by the authorities of the town. (10 Pet. 662; 6 Mart. 19; 4 How. 430.) There was no street in use at the time of the survey in 1835; the street was merely a nominal call. The survey could not take away the right to accretion that might afterwards be made. (18 How. 150.) No patent certificate has issued on the survey. The plaintiffs' title under acts of 1812 and 1816 is good. (16 How. 494; 17 How. 403; 19 How. 202; 18 How. 473.) There was no land beyond the survey; the

river was in the line of the block, and the survey showed what was not to be found on the ground.

VII. The survey of school lands was void. The land was not a vacant village or out-lot under the act of June 13, 1812. It was under water until 1844; when it emerged it became alluvion.

*Casselberry*, for respondents.

I. No owner of real estate was entitled to any riparian rights within the old Spanish town of St. Louis; there was an open space between the river and the first row of lots, which belonged to the public. (2 White, Recop. 99, 1111.) If any person had possessed any lot to the edge of the river he was a violator of Spanish law, and had no lawful "right, title or claim" to be confirmed by the act of 1812. All the Spanish towns in Missouri that fronted on any river, four in number, had open spaces between the lots owned by private individuals and the river. See plats in office of surveyor general. (10 Pet. 662; 1 Hennen's Dig. 5—9; *Livingston v. Hurman*, 9 Mart. 656; *Packwood v. Walden*, 7 Mart. N. S. 88, 626; *Morgan v. Livingston*, 6 Mart. 325.) The title to the streets is and was in the public. (See Revised Codes, 1825, 1835, 1845, 1855, tit. Town Plats.) The plaintiffs were not riparian proprietors.

NAPTON, Judge, delivered the opinion of the court.

The facts of this case are essentially the same as in the case of *Smith and others v. The City of St. Louis*, 21 Mo. 36.

Upon the trial, however, in the present case, the plaintiffs confined the documentary proofs on their side to the confirmation to Auguste Chouteau under the act of Congress of 13th June, 1812—relying on parol proof of possession and inhabitation to show the extent and boundaries of the lot, without introducing the official survey of 1850—the original grant to DeValsey, made by St. Ange in 1766, three years after the town of St. Louis was founded, and the confirmation of this grant by the act of Congress of the 29th April, 1816. The

survey of Brown, under the three confirmations—of the old board of commissioners and of the two recorders, Bates and Hunt—was introduced in evidence by the defendants.

It is not by any means clear that the introduction or omission of the survey could materially affect the question of riparian rights. In either case, the lot is bounded on all sides by streets. The original concession, in addition to giving a boundary on all sides by streets, makes its eastern side "*face au fleuve*" or front towards the Mississippi; and the only question not discussed or determined in the former case, is whether this expression in the original concession constitutes the lot a riparian one, taken in connection with the other descriptive words of the grant.

The DeVolley grant was of a lot 240 feet front, on the side of or towards the Mississippi river (*du côté du*), and fronting thereto (*et y faisant face*), by 300 in depth on the side towards the woods (*du côté du bois*), having on its front the grand or main street (*tenant la dite face et pardevant la grande rue*), on its rear another great street, &c.

Confining ourselves, then, to this concession, we find that the lot conceded was bounded on the east by Main street (*le grande rue*), on the west by another great street, not named, and on the north and south by streets running at right angles to the streets first named. The terms of the grant also describe the east front to face the river (*y faisant face*). The question is, do the words "*faisant face au fleuve*" make this lot a riparian one, notwithstanding the particular designation of the streets on all its sides?

The law of alluvion is understood to be a part of the *jus gentium*, that code which natural reason has established among all men. As the Romans, more than any other ancient nation, had investigated with great care and ability the principles which natural reason dictated as the rule of action among men, and had, at all events, so far advanced beyond their predecessors in civilization, the Greeks, as to reduce these principles to a code, it is to the civil law, and the codes of modern Europe based upon it, that we must resort to

ascertain the true extent and limits of this doctrine of alluvion. It will be found, indeed, that upon this subject the Roman law, and the French and Spanish law which sprung from it, are essentially alike, if we except mere provincial modifications; and it is believed that the English common law does not materially vary from them. This uniformity necessarily results from the fact that the foundation of the doctrine is laid in natural equity. That which common sense or natural reason has established among enlightened people must be essentially the same everywhere, and as all the various codes are drawn from this common source, their main features must be also the same.

The plain and simple principle upon which the right of alluvion is placed in the civil law is, that he who bears the incidental burdens of an acquisition is entitled to its incidental advantages; consequently that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be gradually annexed to it. This rule, however, did not apply to fields which the Romans termed limited, or *agri limitati*. "In agris limitatis jus alluvionis locum non habere constat."

The difficulty has been to determine the true meaning of this exception. So far as the question has arisen frequently in Louisiana, in reference to Spanish grants, and so far as the question in this case is concerned, the point has been there, and arises again here, whether a lot in a town surrounded by streets is properly riparian, or is *ager limitatus*, and therefore not entitled to riparian rights. We have also to consider the further question, whether the description in DeVolsay's grant, and the use of the words "face au fleuve," qualify or limit or destroy the effect of the particular designation of the limits by streets.

There was undoubtedly a distinction in Lower Louisiana between the Spanish grants of rural lands lying on the Mississippi, and the lots laid out in the city of New Orleans as authoritatively established by the Mississippi Company. In

all grants of lands on the river, there was a reservation, implied or express, of a road or highway on the river bank. This grew out of a peculiarity in the physical conformation of the country, where dykes or levees were essential to the protection of the river low grounds from inundation, and where custom or law had located the public road on the river bank, either adjoining to or on the levee. There is no doubt that, according to well settled and perfectly harmonious decisions of the courts in Louisiana, a grant of rural lands with a river front, or by the unqualified expression "face au fleuve," would take the proprietor to the river, notwithstanding this easement of a road on the levee, or adjoining, to which the public were held entitled. The intervention of the road in such cases does not prevent the right of alluvion. The grant is considered a riparian one, and attended with all the incidents of such grants. It has been equally well established that the lots in the original city of New Orleans, as authoritatively laid out by the Mississippi Company, adjoining the river, are not entitled to alluvion. We do not, however, from this circumstance, infer that there was an essential distinction between urban and rural property, based *solely* on this single peculiarity. The decisions in Louisiana are not understood to declare that urban property may not have riparian rights; that a town proprietor, whether sovereign or a private individual, may not so lay off lots in a town or city as to be strictly riparian and entitled to the benefit of alluvion. No reason is perceived why this riparian privilege should be confined to lots of a particular size or in a particular locality. These are not the circumstances which seem to us to determine the question. If the river is the boundary of a town lot, it may be riparian just as much as a tract of land would be in the country. But the question is, whether a lot of ground, which is bounded or limited by streets, can with any propriety be said to be bounded by a river. Is it not *ager limitatus*, within the definition of that term as understood by the civilians?

In the French Encyclopedia—a work of high authority,  
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from the great reputation of its principal contributors, and quoted in the discussions on this subject which the celebrated Batture controversy elicited—we find the following exposition of this doctrine: “We must observe, however, that to acquire by right of alluvion, two conditions are necessary: first, that the increase should be made slowly and imperceptibly, in such a manner that it can not be discovered in what time each part of the alluvion has been formed to and consolidated with the inheritance; second, that the inheritance, by virtue of which the right of acquiring by alluvion is claimed, be contiguous to the river, in such a manner that the bed on which it flows seems, as it were, to be a part of the same inheritance; for in case it did not bound exactly to the river, and that it was bounded by a causeway, or by a road, the parts left uncovered by the river between its bed and the road can not belong to the proprietor of the inheritance situated on the other side of the road. Those lands belong to the king in navigable rivers, and to the feudal lords in those that are not so.” (2 Hall, L. J. 327.) It will be remarked that this position does not conflict with the doctrine of the Louisiana courts, which held the Spanish grants upon the Mississippi to be riparian, notwithstanding the intervention of a road or highway between them and the river. These grants were *bounded* by the river and not by the road. Their extent and boundaries on the side adjoining the river shifted with the windings of the stream, and the road was liable to the same fluctuations. Whether the road was regarded as absolutely vested in the public, or what would be termed at common law a mere easement, did not vary the force of this circumstance. It was a road which had to be left open on the land granted, and the burden of its repair, and of furnishing a new road further back in the event of the original road being carried off into the river, devolved on the proprietor of the grant. It is not, then, the *existence* of a road or causeway which deprives the owner of alluvion, but it is the fact that the road or causeway is the *boundary* of the land.

This opinion in the Encyclopedia seems to be confirmed by what we find in those eminent publicists, Vattel, Puffendorff and Wolff, and referred to by Mr. Duconceau in his opinion on the Batture case. (4 Hall, L. J. 549.) Vattel says, (book 1, p. 207,) "The river belongs to the public in whatever part of the country it flows; but the bed being abandoned, half of it is added on each side to the contiguous land, if they are *arcifinies*, that is, having a *natural boundary with the right of alluvion*." Wolff says, (part 2, ch. 3, sec. 252,) "Landed estates are of three kinds: 1st. Those that are not limited by any precise bounds, but are only described by the quantity which they contain. 2d. Those which have fixed artificial limits—that is to say, boundaries made by the hand of man. 3. Those which we call *arcifinies*—that is to say, which have natural boundaries, such as rivers, mountains or woods. He who has wished that his estate should be *arcifinie* is considered as having acquired the right to take possession of alluvions; therefore the right of alluvion belongs to those whose estates are *arcifinies*, and not to others. Consequently, as an estate is not said to be *arcifinie* if there be between it and the river a public road, *not due by the estate and a part thereof*, the right of alluvion is not attached to the property of the estate." Puffendorff, (book 4, ch. 7, § 12,) says: "This right (to alluvion) is presumed to accompany any piece of land assigned to a private person, if, in assigning the bounds of it, the neighboring river is mentioned at large."

The opinions of Mr. Livingston in the various discussions, which he maintained before the public and at the bar, on this doctrine of alluvial rights, could not, taking with consideration the circumstances under which they were delivered, be regarded as authoritative; yet his eminent abilities, the great labor and research bestowed by him on the subject, and the great number of years during which these researches were conducted, render his deliberate conclusions, asserted with confidence and persisted in with uniform consistency to the last, worthy of attention and respect. Upon the point now

under consideration Mr. Livingston, from the beginning of his controversy with Mr. Jefferson, in 1807, down to his argument before the Supreme Court of the United States in 1836, in the case of New Orleans v. The United States, uniformly maintained that "wherever such a boundary line as a street existed between the land and the river, the proprietor of the lot could not claim the alluvion, for the plain reason that he was not the proprietor to the water's edge, and that therefore what was added by the water was not added to his land, but to the land which lay between his front boundary and the river." (5 Hall, L. J., p. 123.) In relation to the Spanish grants of lands on the Mississippi, (rural grants,) Mr. Livingston admitted, and such was indeed the ultimate decision of the court in Morgan v. Livingston, 6 Martin, —, that "the expressions used in those grants to designate the boundaries and extent were generally, perhaps universally, so many acres front, or front to the river, (*tant d'arpens de face*, or *face au fleuve*, or *sur le fleuve*,) and these expressions, *when thus unqualified*, had, without a single exception, been considered as giving the grantee a boundary on the river." (5 Hall, L. J., p. 120.) But Mr. Livingston adds, "that in most instances in Europe, and some in America, where towns have been established on public lands, the town lots have no right of alluvion; but the reason flows from the very principles I endeavor to establish. It is because the public is, and individuals are not, the riparian owner. All the land belonging to the sovereign, he grants lots by *metes and bounds*; these become *agri limitati*, and are not entitled to alluvion." (p. 188.)

It did not become necessary to decide this point in the case of Gravier v. New Orleans, determined by the territorial superior court in 1806; (2 Hall, L. J., p. 441;) but it was held in that case, as in the subsequent decision by the supreme court of the state, in Morgan v. Livingston, that the Gravier tract was bounded by the river and not by the highway, and that alluvion attended the grant; that although Gravier had sold all his front lots, yet, as the alluvion was in

existence at the date of the sale, and was not in terms granted along with the lots, and was not divested by any acts or words amounting to a dedication to the public, Gravier was still the owner of the Batture. In the case of *Morgan v. Livingston*, 6 Martin, —, Poeyfare's deed had no limit on the side of the river; it was sold simply *face au fleuve*, and not a foot of ground was retained by Gravier between Poeyfare and the river; and he, Poeyfare, was considered as the proprietor, upon whom the law imposed the burden of repairing the road and the levee and supplying the ground for another road and levee, if either was carried away by the stream. In the argument of that case, Mr. Livingston maintains the same principle he had asserted in his pamphlet reply to Mr. Jefferson: "It is admitted," he says, "that if the conveyance to Poeyfare had been of a lot in an established town, the words used in it would not bound the grantee on the water;" and he states as a fact that all the lots in New Orleans, on Royal street, are designated in the grants as "*frente al rio*," and so in all the title deeds to the lots on Levee street, but they had been always regarded as town lots, limited by the streets, and not bounded by the river, and entitled to alluvion. He therefore contended that the presumption, which the words "*face au fleuve*," or "*frente al rio*," ordinarily carried with them, could not prevail in a town lot, where the precise measurement was given, and the public streets formed an impediment to the passage of the lines across it, and that the lot in Gravier's addition was as much a limited lot as in the city proper established by the Mississippi Company. The general proposition in relation to town lots was admitted by the able counsel who was on the opposite side. "To the city," said Mr. Ellery, "belong as necessary appendages, its commons and shores; its lots are all bounded by streets, and are sold, whether so expressed or not, *according to its plan*." (6 Martin, p. 134.) But he contended, and successfully, that Gravier's addition and plan did not make Poeyfare's lot a town lot; that it was a trape-

zium of an irregular figure ; that so far from being bounded by streets, no streets were named in it ; that it was in fact so located as to shut up three streets laid out in the plan of the addition ; that it was not called a lot, but a piece of ground, *un pedazo de tierra*. The opinion of the court was in accordance with these views of Mr. Ellery. Judge Martin states in his opinion that New Orleans was the only town established by legal authority, and that in it the owners of the lots nearest to the river have no part of the bank as accessory thereto. "These lots were not charged with any of the burdens attending rural riparian estates ; the levee, road or street was made or kept in repair at the joint expense of the owner of every lot in the city, the furthest from the water contributing as much thereto as the nearest ; no riparian duties are imposed on a lot in New Orleans, either by the law or any clause in its grant." But the judge regarded Poeyfare's purchase of the trapezium as a purchase of rural estate, burdened with riparian duties ; that he had imposed upon him the duty of repairing the road and levee, and that Gravier's private survey of the land did not relieve him from this duty ; and that the assent of the sovereignty alone could change this corresponding burden and benefit.

It will be seen, by reference to the subsequent opinion of this learned judge in the case of the Cotton Press, 18 Lou. 249, that the decision in *Morgan v. Livingston* was mainly based upon the position that Poeyfare's lot was rural property ; that it was *ager arcifinious*, and not *ager limitatus* ; that the assent of the Spanish government to the erection of Gravier's faubourg not having been given until the arrival of the Baron de Carondelet in Louisiana, several years after Gravier's sale to Poefare, the plaintiff's claim was to be regarded as still rural ; and the opinion of Judge Martin, as explained and more fully developed in the case of the Cotton Press, is undoubtedly in conformity to the views urged by Mr. Livingston in the former case, and harmonizes with the views taken by the same judge in *De Armas v. The Mayor, &c.*, 5

Lou. 132, and sanctioned by the Supreme Court of the United States, in *New Orleans v. United States*, 10 Peters, 662, and *Cinnannati v. Lessee of White*, 6 Pet. 432.

The doctrine of the Roman law concerning *agri limitati* is fully recognized by Judge Martin as not confined to a particular class of military grants peculiar to that empire, but as a deduction of natural reason applicable whenever the character of the grant makes it so. "All the lots in New Orleans," observes the judge, "are *agri limitati*, for, as the street runs along the river in front of them, none of them are bounded by the river, and, as the street is not at their risk and charge, they can not be injured by the action of the water thereon." Here it will be perceived that the exemption of the lots bordering on the river in New Orleans, from the privileges and burdens of riparian lots, is not placed upon the ground that the city was authoritatively established, but upon the general principle that they are *agri limitati*; that they are not in the legal sense of the term riparian; that, not being subject to the burdens of riparian proprietors, the owners of such lots are not entitled to the alluvion.

The opinion of the majority of the court on this point, delivered by Judge Bullard, does not deny the general principle of *ager limitatus*, although its applicability to the case under consideration was denied. Judge Bullard's conclusion, after a critical examination of the text in the Roman digest, and a reference to authority of Niebuhr, is in these words: "After the most attentive consideration of this part of the case, it appears to me there is nothing in the Roman law which provided that the right of alluvion was restricted to land, or portions of land, bearing particular names, or having particular localities; but the right depended altogether upon the question whether the tract had fixed and invariable limits, or a natural boundary on one side at least, liable to be affected by a water course, no matter whether it bore the name of *ager*, *prædium*, or *fundus*; nor do I find that cities formed any exception to the general rule."

This case was determined in opposition to the opinion of

Judge Martin; but there were various circumstances, bearing upon the main question in the case, growing out of the changes in the codes of Louisiana, which recognized, or appeared to the court to recognize, the rights of individual ownership in the Batture of New Orleans, making no distinctions between it and rural estates, so that it can not be considered as conclusive upon the question we are called upon to determine in this case. The point upon which the opinion of the majority of the court turned—in coming to the conclusion that the intervention of a street between a lot in the faubourg of New Orleans and the river did not prevent the lot from being riparian, any more than the road, which was impliedly reserved to the public in rural grants, formed an obstacle to the right of alluvion in such grants—was that, in both cases, the road or street vested absolutely in the public, and therefore the proprietor might be said to go to the water's edge in one case with as much propriety as in the other. It is true that the courts in Louisiana had held that the soil of a public road belongs to the public; but, conceding this position—concerning which, however, there has been some diversity of opinion among the writers on civil law—the concession does not destroy the distinguishing characteristics of the two classes of grants. There is still an essential distinction between the road which shifts with the stream, and which does not bound the grant, and the street which is fixed and is the limit of the lot. In the one case, the proprietor of the land is bound not only to repair the road, but to furnish a new one when the old one has been washed away. In the other case, the proprietor of the lot bounded on one side by a street not only can have no kind of claim to the street or the soil in it, but he is under no more obligation to keep it in repair than any other owner of an adjacent lot or lots situated in any other part of the city. If the street is lost in the river, it can not be claimed that the proprietor of the lot is bound to furnish the public with another street over his lot. Under the power of eminent domain the public may undoubtedly require the street to be opened

over the private lot, but this can only be done by compensating the owner. The condition, therefore, of urban and rural property seems to be, in this respect, essentially different, where the city lot is bounded by a street next to the river, and its limits are not the river bank itself. In truth, the doctrine of the civil law, that the soil of the public road belongs to the public, must necessarily be understood as true only *sub modo*. It is admitted that in the case of rural grants, the road changes with the stream along whose banks it passes, and that when one road is lost by the inundations of the stream, another is still due from the proprietor to the public. The soil, then, of the second road, and of any number of successive roads, must all be vested in the public, and this seems, after all, to be a mere change of words to describe what the common law terms an easement. This it is to all essential purposes, whatever may be its name; and yet, upon this single circumstance, the opinion of the majority of the court in the Cotton Press case, in 18 Lou. 249, is based, so far as this point is concerned, and we confess that the conclusion of Judge Martin seems to us better supported both by authority and reason.

Our conclusion is that the DeVolsey grant, being of a lot in the town of St. Louis bounded in the concession by streets, was not a riparian grant, notwithstanding the description of the lot as fronting on the river on its eastern side, as its western was described as fronting towards the woods.

We do not consider the fact that the town of St. Louis was laid out without any express authority from the king of Spain, as entitled to any weight in determining the character of the concession of lots by the Spanish commandant. Our opinion upon the proper construction of St. Ange's concession is not based upon any distinction between urban and rural property, as such, but upon the general doctrine of limited fields, applicable, as we understand it, to grants in the country as well as in the city, where the lines of enclosure are fixed and definite, and do not vary with the river on which the land may be located. It is not easy to perceive

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how the circumstance that a proprietor establishes a town, with or without legal authority, can affect the construction of his grants or conveyances of lots. It might be so if the law was that lots in a town or city *ex vi termini* are deprived of alluvion, no matter how designated or bounded. But we do not so understand the law. It is not simply because a lot is in the city that it is deprived of alluvial rights, where it lies adjoining a stream; but it is because the street between the lot and the river is dedicated to the public by the proprietor, and is no part of the lot granted, because the lot is bounded by the street, and its owner is under no obligation to repair it other than that which may be imposed upon all other citizens.

The judgment of the land court is affirmed. The other judges concur.



SCHULTZ *et al.*, Appellants, v. LINDELL *et al.*, Respondents.

1. The actual possession of a part of a tract of land by the rightful owner carries with it the constructive legal possession and seisin of the whole tract so far as the same is not *actually* occupied adversely by another.
2. Where, however, the true owner of a tract of land is not in the actual possession of any portion of such tract, the actual possession of a part of the same by another, who is in such possession under a colorable title to the whole, will carry with it a constructive possession of the whole tract as against such true owner.
3. Where a large tract embraces and includes several smaller tracts, an actual possession by the owner of the large tract of a small portion of the same outside of one of the smaller tracts included in it will not be construed to be a constructive adverse possession of such smaller tract against the true owner thereof, although the latter may not be in the actual possession of any portion of his tract.
4. Where a defendant in ejectment seeks to show an outstanding title in another, and offers in evidence a deed executed by the same parties under whom plaintiffs claim, he may by extrinsic evidence, if the descriptions and calls of the two deeds are different but not repugnant, show that the calls are such as will make the deed under which defendant claims embrace the same land conveyed to plaintiffs.
5. The *opinion* of a surveyor as to the proper *location* of a grant or conveyance of land is inadmissible in evidence to determine such location.

*Appeal from St. Louis Land Court.*

This was an action to recover possession of a portion of a tract of one by forty arpens of land situated in the Grand Prairie common field, near St. Louis. This case has heretofore been before the supreme court. (See 24 Mo. 567.) The action was commenced September 19, 1855. Said tract of one by forty arpens was confirmed by act of Congress of July 4, 1836, to William Bizette's representatives, and surveyed by United States survey No. 3340. Plaintiffs also claim title under John B. Provenchere, to whom, it is alleged, the land was confirmed by act of Congress of June 13, 1812.

The defendants denied the plaintiffs' right of possession and set up the statute of limitations.

The plaintiffs introduced evidence tending to prove the claim, cultivation and possession of the lot in question by John B. Provenchere, an inhabitant of the town of St. Louis, as the last claimant and cultivator prior to December 20, 1803; also the location and boundaries of the lot, and its identity with that surveyed by United States survey No. 3340; the death of John B. Provenchere; that Jean Louis Provenchere was his son and entitled as heir to one-half of said lot. Plaintiffs showed a derivative title from said Jean L. Provenchere to said half. Plaintiffs adduced in evidence, to make out this derivative title, a deed, dated July 29, 1816, and acknowledged July 31, 1816, executed by Mary Provenchere, widow, and said Jean Louis Provenchere, son of said John B. Provenchere, conveying to Risdon H. Price a tract described as follows: "A certain tract or parcel of land situate, lying and being at the place commonly known by the name of Big Prairie, about three and a half miles west of St. Louis, and containing one arpent in front by forty arpens on the rear, bound north by land now belonging to Joseph Lacroix, as it is said, and south by land cultivated formerly and said to belong to one Simoneau, it being the same tract or parcel of land which the said John B. Pro-

venchere, in his lifetime, cultivated for many consecutive years prior to 1803."

The defendants, for the purpose of showing title out of plaintiffs, offered in evidence a deed from the grantors of the above conveyance—Mary and Jean Louis Provenchere—to Joseph Phillipson and Sylvester Labadie. This deed was dated and acknowledged July 25, 1816. The land conveyed by this deed was described as follows: "A tract of land lying and being situate at about three miles and a half in the western part from the town of St. Louis, at the place commonly denominated 'Grand Prairie;' which land contains two arpens in front by forty in depth, and is bounded on the north side by a road thirty-six feet broad, which separates it from the land which Pierre Chouteau bought of Alexis Marie, and on the south side by the land of an owner unknown; on the east and west by vacant lands; which land belongs to us, as having been cultivated during a number of years by the said Jean Baptiste Provenchere, deceased, and whose heirs we are," &c.

The defendants introduced as witnesses Augustus H. Evans and William H. Cozens, practical surveyors, into whose hands the above deeds to Price and to Phillipson and Labadie, as also various other deeds conveying lots in the Grand Prairie common field, were placed; the testimony of a witness, Noisé, was also read to said witnesses from the notes of counsel, and they were asked to state, as experts, where, by the calls in said deeds and the testimony, they would locate the tracts conveyed by said deed. The witnesses were permitted to answer these questions against the objection of the plaintiffs. Other evidence was introduced bearing upon the locations of the tracts conveyed by said two deeds of Mary and Jean Louis Provenchere.

Evidence was also adduced with a view to support the defence of the statute of limitations. The defendants put in evidence deeds conveying to them the land embraced within the Hunot and Conway New Madrid locations; also other arpent lots in the Grand Prairie. The New Madrid loca-

tions included said smaller tracts and also much more besides. Evidence was introduced showing an actual possession, for twenty years, on the part of said Lindell, of a portion of said New Madrid locations outside of the lot in controversy. No deed was shown conveying to defendants the particular lot in controversy.

The court gave the following instructions at the instance of the plaintiffs: "1. If the jury believe from the evidence that John Baptiste Provenchere, as an inhabitant of the town or village of St. Louis, prior to the 20th day of December, 1803, claimed and cultivated or possessed the lot of land mentioned and described in the petition as a common field lot adjoining or belonging to said town or village, and was the last claimant and cultivator thereof prior to that date; and if the jury further believe from the evidence that said John Baptiste Provenchere died prior to the 29th of July, 1816, leaving Mary Provenchere his widow, and a son, Jean Louis Provenchere, and a daughter, Madame Lajoie, as his only heir or heirs living at his death, and that the deeds given in evidence by the plaintiffs to show a derivation of title to them from said Jean Louis and widow Mary Provenchere are genuine, and that the lot mentioned in said deeds is the same lot which was so claimed and cultivated or possessed as aforesaid by said John Baptiste Provenchere, then the plaintiffs are entitled to recover one undivided half of so much of said lot as the jury find to have been in the possession of the defendant at the commencement of this suit lying outside of the Mad. Camp survey; unless the jury also find that the lot mentioned and described in the deed of said Mary and Jean Louis Provenchere to Joseph Phillipson and Sylvester Labadie, dated July 25, 1816, covered the same land mentioned and described in said deeds given in evidence by the plaintiffs. 3. The jury are instructed that the legal seisin and possession follow a title under the act of Congress of June 13, 1812, and that the defendants, setting up an adverse possession for twenty years against such legal seisin and possession, must show by evidence, to the satisfaction of the jury,

that they or either of them have had a visible, notorious and continuous possession of the land in controversy during the period next before the commencement of this suit; otherwise the statute of limitations is no defence against such a legal title and possession. 4. The jury are instructed that the United States survey No. 3340, given in evidence by the plaintiffs, is evidence of the location, extent and boundaries of the lot which was confirmed by the act of July 4, 1836, to Guillaume Bezette's legal representatives; and if the jury believe from the evidence that the same lot came into the possession of John Baptiste Provenchere, and was claimed, cultivated or possessed by him, and in his own right, as an inhabitant of the town of St. Louis, as a common field lot, adjoining or belonging to said town, prior to the 20th of December, 1803, as the last claimant and cultivator thereof prior to that date, then said survey is evidence of the location and boundaries of the lot claimed and cultivated or possessed by him."

The court refused the following instruction asked by the plaintiffs: "2. If the jury believe as required by the foregoing instruction No. 1, in order to enable them to find for the plaintiffs, then the jury is further instructed that the defendants have given no evidence of adverse possession of the land in controversy for twenty years next prior to the commencement of this suit, which is sufficient in law, if true, to constitute a bar to this suit under the statute of limitations."

The court gave the following instructions at the instance of the defendants: "1. If the jury believe from the testimony that the defendants, or either of them, have had possession of the land in question, using and claiming the same as their own, and holding it adversely to the plaintiffs and to those under whom they claim for the space of twenty years or more next before the commencement of this suit, the jury ought to find for the defendants. 2. And as to what is possession in the sense of the above instruction, if the jury find that the defendants entered into possession of part of the tract, claiming the whole by deed, and asserting ownership

of the whole, [that is possession of the whole] if there be no actual, adverse possession held by some other person. An enclosure by a fence is not necessary to constitute possession, legal or actual."

The jury found for defendants.

*N. Holmes*, for appellants.

I. The instruction given for defendants, No. 2, was contradictory in principle to that given for plaintiffs; it was unsound in point of law and tended to mislead the jury. (*Griffith v. Schwenderman*, 27 Mo. 412; *McDonald v. Schneider*, 27 Mo. 405.) Possession of part claiming the whole under color of title is not an adverse possession as against the constructive possession of the true owner beyond the actual adverse occupancy. (Ang. Lim. 400, 410.) Defendants did not claim under any deed describing the particular lot, but under deeds describing the larger tracts of the New Madrid locations. There was no actual adverse occupancy of this lot, or any part of it, for twenty years. Plaintiffs' second instruction should have been given. Defendants' instruction should have been refused, as not warranted by the evidence.

II. The deed from Mary and Jean Louis Provenchere to Phillipson and Labadie should have been excluded. It did not purport to convey the lot in controversy, but another and wholly different lot. Evidence *aliunde* for the purpose of showing that it did convey, or was intended to convey the lot in controversy, was inadmissible. The call for two by forty arpens was essentially descriptive. (4 Cruise, Dig. p. 334-9; 3 Pick. 4.) The call for "a land of an owner unknown" on the south adds nothing to the call for quantity. (See 10 Mete. 17; 3 Pet. 92; 18 Mo. 87.) There was nothing on the face of the deed nor any evidence *aliunde* offered to show that the two by forty arpent lot had ever been located on the ground, or had ever existed at that place. There is nothing in the deed, except the call for two arpens front, to give width to the lot, to constitute a tract of land. Strike it out and the deed becomes void for uncertainty. It can not

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be rejected as repugnant. (See 4 Mass. 196.) Evidence *aliunde* can not be admitted to introduce new words into a deed. (8 Bing. 244; 1 Greenl. Ev. 301; 4 Cruise, Dig. p. 296.) The call for two arpens front is not a latent but a patent ambiguity. (Bac. Max. Reg. 23; 1 Greenl. Ev. § 297.) Evidence *aliunde* is not admissible to make a deed convey a different thing from that described in it. Besides, the evidence introduced by defendants to explain the only call that admitted of such explanation in reference to the subject matter of the grant, the northern call, wholly failed to show that the thing described ever had an existence at all at that place. The legal effect of the instrument is for the court to declare. (9 Mo. 603; 1 Dev. & Bat. 425; 4 Cru. Dig. p. 295; 3 Washb. 294; 5 Greenl. 496; 28 Mo. 407.) The subjects of grant described are not the same on the face of the two deeds. The call on the north may admit of explanation, but the others not. Both deeds were with special warranty against the grantors themselves. They were contemporaneous. (17 S. & R. 110; 7 Mass. 499; 5 Scott N. R. 1037; 28 Mo. 479.)

III. The opinions of the witnesses Evans and Cozens, practical surveyors, should not have been admitted to locate the deeds and the lots in controversy. The disseisin of the matters in issue was taken away from the jury and given to these witnesses. Their *opinions* were inadmissible. (Blumenthal v. Roll, 24 Mo. 113; 8 Mar. N. S. 695; 10 N. Hamp. 130; 1 Greenl. Ev. § 440; Williams v. Carpenter, 28 Mo. 461.)

B. A. Hill, for respondents. \*

EWING, Judge, delivered the opinion of the court.

It is insisted that the instruction given for the defendant defining adverse possession was contradictory in principle to that given for the plaintiff on the same subject; and it is maintained that possession of a part claiming the whole under color of title is not an adverse possession, against the

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\* There is no brief on file in behalf of respondents.

constructive possession of the true owner, beyond the actual adverse occupancy. This proposition, in the general terms in which it is stated, we think, is incorrect as applied to the case before us. Its correctness would not be questioned as applicable to cases where the true owner and an intruder, or even one holding by color of title, are both in possession of different parts of the same tract. In such cases, the actual occupancy of a part by the rightful owner carries with it the constructive legal possession and seisin of all not actually occupied adversely. (*Hale v. Powell*, 4 Serg. & R. 465.) But a different doctrine prevails where the rightful owner is not in possession at all, and the adverse holding is by color of title. If A., with color or claim of title, enter upon the land of B., who has the superior title, his possession is not adverse as to B. beyond the part actually occupied by him, if B., the rightful owner, is also in possession of another part of the same land. In that case, both being in possession, the constructive possession of B. prevails over all not actually occupied by A., by virtue of his superior title. If, however, he who claims to be the true owner is not in possession, the possession of him who is in under a colorable title is construed to be coextensive with the premises described by his deed; and this is the character of the case at bar. The controversy here is not between two persons in the actual possession of different parts of the same tract as to their respective rights to that part not actually occupied by either, but as to the effect of a possession by the defendant with a color of right against the plaintiff, who claims to be the rightful owner, but is out of possession. It is not pretended that the plaintiff, or those under whom he claims, have had possession since 1812.

The *locus in quo* is a small tract of 34 30-100 arpens, a concession to William Bizette, situated in the Grand Prairie, numbered as survey No. 3340, confirmed by act of Congress, and which it is claimed lies within New Madrid locations, which are the source of the defendants' title. There was evidence tending to show that a part of the lot in dis-

pute, as well as other portions of the larger tract, was in the adverse possession of the defendant for more than twenty years before the commencement of this suit; but there was no evidence of possession within that period by the plaintiffs or those under whom they claim; and, upon the facts disclosed on the trial, the question is whether the law was properly declared in the instructions given on the subject of adverse possession.

The instructions given at the instance of the plaintiffs tell the jury that the legal seisin and possession follow a title under the act of June 13, 1812; and that the defendants, setting up an adverse possession for twenty years, must show, by satisfactory evidence, that they, or either of them, have had a visible, notorious and continuous possession of the land, &c., during that period. For the defendants, the jury were told that if they, the defendants, have had possession of the land in question, using and claiming the same as their own, and holding it adversely to the plaintiffs and those under whom they claim, for the space of twenty years or more next before the commencement of the suit, there ought to be a finding for the defendants. Possession, in the sense of this instruction, is defined to be, that if the defendant entered into possession of part of the tract, claiming the whole by deed, and asserting ownership of the whole, this is possession of the whole, if there be no actual adverse possession. An enclosure by fence is not necessary to constitute possession, legal or actual.

The last instruction was a proper qualification, under the evidence in the case, of the propositions embraced in the plaintiffs' instruction; and they are consistent with each other. The defendants were entitled to the benefit of the distinction, implied in their instruction, between a mere intruder and one entering into possession with a claim of right. If the defendants entered upon the land in dispute, and had possession of a part, the deed under which they claimed described the boundaries within which the jury were to determine, under the instructions, whether there was such an

assertion of ownership and use of the premises as to bar the plaintiffs' right of action. They were to ascertain whether there was in fact a possession of a part of the tract, claiming the whole, and, if so, whether there was such a use as, in the language of the plaintiffs' instruction, was visible, notorious and continuous.

Where a large tract embraces several smaller ones, a *pedis possessio* of a few acres, by one setting up title to the larger tract, claiming the whole, would not be a defence against a superior title in any one of the smaller tracts. There is in such case no ouster of the owner of the smaller tract, because the possession, being of a part of the larger tract not included in his, is not adverse to him; and the constructive possession following his title will prevail against any other but an actual possession. Where, however, the rightful owner of one of the smaller tracts is not in possession, and the claimant of the large one enters upon and encloses a part of the former, and continues in possession for twenty years, claiming the whole, he would not be confined to the part actually occupied, but his possession would be construed to be coextensive with the boundaries of the deed. The second instruction asked by the plaintiffs was properly refused.

The admission of the deed read in evidence of Mary and Jean Louis Provenchere to Phillipson and Labadie is assigned for error. This deed was dated July 25, 1816, four days before the date of that from the same grantors to Price, under which the plaintiffs claim title. The deed was offered to show an outstanding title; and the objection to its admission is that it does not purport to convey the lot in controversy, but another and wholly different lot, and that evidence *aliunde*, to show that it did convey, or was intended to convey, the lot in dispute, was inadmissible. The calls in the deed under which plaintiffs claim title are for a tract of land in a place commonly known as the Big Prairie, about three and a half miles west of St. Louis, containing one arpent in front by forty arpens in the rear, bounded north by land now belonging to Joseph Lacroix, as it is said, south by land culti-

vated formerly and said to belong to one Simoneau, it being the same tract or parcel of land which the said John B. Provenchere, in his lifetime, cultivated for many consecutive years prior to 1803. The deed to Phillipson and Labadie described the land it conveys as lying in the Grand Prairie, and which land contains two arpens in front by forty in depth, and is bounded on the north side by a road thirty feet broad, which separates it from the land which Pierre Chouteau bought of Alexis Marie, and on the south by land of an owner unknown, on the east and west by vacant lands, which land belongs to us as having been cultivated during a number of years by the said Jean Baptiste Provenchere, deceased.

Though the subjects of the grants are not the same on the face of the deeds, they may be so in point of fact; and if there is nothing absolutely repugnant in the description or calls, then evidence *aliunde* is admissible to identify them. As to the northern boundary, it is obvious there is no such repugnancy.

But it is insisted that the calls on the other three sides, being for quantity alone, are therefore essentially descriptive, and do not admit of any explanation or modification by extrinsic evidence. It may be admitted that the calls for quantity are essentially descriptive, yet it does not follow that the conclusion drawn therefrom is correct. The deed to Price is for one by forty arpens, with Lacroix's land for the northern boundary, containing one arpent in front by forty in depth. The deed to Phillipson and Labadie calls for two arpens in front by forty in depth. It is true, there is nothing in the deed to give *width* to the lots except the call for two arpens front, but it is not necessary to strike out two and insert *one* arpent in order to make it a description of the lot in controversy, or of a tract including it; and it is therefore not liable to the objection of introducing new words and a new description into the body of the deed.

Now supposing the call for quantity in the deed to Phillipson and Labadie is essentially descriptive, it may nevertheless include the land in dispute; for if the calls for the

northern boundary are not on the face of the deeds repugnant, as it is obvious they are not, then neither is there any repugnancy in the calls on the east and west; that is, from any thing appearing on the deeds, they may coincide to the extent of one arpent. Both tracts have the same depth, each being forty arpens. The call for quantity, then, of two by forty arpens may be satisfied without any conflict with the description of the deed to Price. It is only upon comparing the two deeds as to quantity that there is perceived on their face any difference, but this difference consists only in the calls for the front. One being for one arpent front, the other *two*, does not make them irreconcilable. It is the difference only between the whole of a thing and the parts of which it is composed, and not of things essentially distinct. In other words, there is nothing on the face of the deeds showing that as a matter of fact three of the corresponding boundaries in the two deeds—north, east and west—*may* not perfectly coincide throughout their whole extent; and if their identity may be shown thus far, the call for the additional quantity of one arpent may be satisfied by producing the east and west lines to the distance of two arpens from the northern line; and thus show the identity of the lot in dispute with a part of the tract described in the deed to Labadie and Phillipson—the greater including the less.

The opinions of the witnesses Evans and Cozens, as to the location of the lot in controversy and of those described in the other deeds read in evidence, were incompetent and improperly admitted; (*Blumenthal v. Ralls*, 24 Mo. 113;) and for this the judgment will be reversed and the cause remanded. The other judges concur.

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
JULY TERM, 1860, AT JEFFERSON CITY.

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THE STATE, Appellant, v. LITTLEPAGE, Respondent.

1. A motion to quash a *scire facias* upon a forfeited recognizance should not be sustained, if sufficient appear upon the entries and files of the court to entitle the State to an award of execution.

*Appeal from Webster Circuit Court.*

W. S. Littlepage was indicted in the Webster circuit court for gaming. He entered into a recognizance with W. S. Tolley and Hamilton McAnally as securities to appear at the October term, 1859, of the Webster circuit court. He failed to appear and his recognizance was declared forfeited, and judgment rendered against him and his securities. On the 2d of December, 1858, a *scire facias* issued in the following form: "State of Missouri—County of Webster, ss. The State of Missouri to the sheriff of Webster county greeting: Whereas at the October term of the Webster circuit court, A. D. 1858, the recognizance of W. S. Littlepage, William S. Tolley and

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Hamilton McAnally was forfeited for the sum of one hundred dollars—said recognizance being conditioned that the said W. S. Littlepage, the principal in said recognizance, shall make his personal appearance before the judge of the Webster circuit court on the first day of the October term, 1858, to answer a bill of indictment there pending against the said W. S. Littlepage for gaming; and whereas the said W. S. Littlepage failed to make his personal appearance before the judge of the Webster circuit court according to the tenor of his said recognizance; and the said W. S. Tolley and Hamilton McAnally, his said recognizers, failed to bring into the said court the body of the said W. S. Littlepage to answer the charge aforesaid, according to the tenor of said recognizance, by reason of which failure their said recognizance was forfeited as aforesaid, whereby the State of Missouri obtained a judgment against the said W. S. Littlepage, W. S. Tolley and Hamilton McAnally for the sum of one hundred dollars. These are therefore to command you to summon the said W. S. Littlepage, W. S. Tolley, and Hamilton McAnally to be and appear before the judge of the Webster circuit court on the first day of the next term thereof, which will be begun and held at the court-house in the town of Marshfield, in Webster county, Missouri, on the second Monday of April, 1859, then and there to show cause, if any they can, why execution should not issue on said judgment for the said sum of one hundred dollars, and costs and charges in their behalf laid out and expended. Hereof fail not, and have you then and there this writ, with your execution of the same endorsed thereon. Witness my hand and official seal, at office, on this 2d day of December, 1858. John Foster, clerk."

This writ the defendant moved the court to quash for the following reasons: because there is no sufficient recital of the record, or of any record, to require defendant to plead to the same; because there are no parties defendant by any name known to the law; because it does not appear that defendants ever entered into any recognizance of which this

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court has jurisdiction ; because the facts recited in said writ are insufficient to require defendants to answer the same or upon which final judgment can be entered up.

The court sustained the motion.

*Knott*, (attorney general,) for the State.

*Parsons & Price*, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This case is determined by the decision in *The State v. Randolph*, 22 Mo. 474. The *scire facias* ought not to have been quashed, and the judgment of the circuit court to that effect will be reversed and the case remanded.

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FLESHMAN, Respondent, v. SHEPARD *et al.*, Appellants.

1. Where property is conveyed in trust, *bona fide*, to secure the payment of certain debts due, and a third person, by virtue of a sale under a judgment against the grantor in the deed of trust, subsequently obtains title, subject to such deed of trust, to a portion of the property embraced in said deed, such purchaser will not be entitled to intervene in proceedings instituted to enforce the deed of trust against all the property embraced in it, and to require that that part of the property in which he has no interest shall first be appropriated to the payment of the trust debt.

*Appeal from Platte Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Pitt*, for appellants.

*Spratt & Merryman*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a suit to decree a sale of trust property for the satisfaction of certain promissory notes for the payment of which said trust had been created, and also for the purpose of setting aside an encumbrance on the property, which it

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was alleged was fraudulent and void. The payment of the notes was decreed by the court. A sale of the property was ordered, and the encumbrance was pronounced fraudulent and set aside. All the parties to this proceeding acquiesced in the judgment of the court. During its pendency, John E. Pitt, who is the appellant here, was permitted to become a party to it and to file an answer, as it is termed, to the plaintiff's petition. The substance of this paper was that subsequently to the deed of trust John Schneider had obtained a judgment against the grantor in the deed. On this judgment an execution has issued, and under it a part of the trust property was sold, and the appellant, J. E. Pitt, became the purchaser at a sum not stated, and received a deed. It is further alleged that the property secured for the satisfaction of the trust, which remained after the sale of the portion of it of which Pitt became the purchaser, was sufficient to satisfy the debt secured upon it. The relief claimed on these facts was that the plaintiff be required to "marshal securities," and that the trust property be so disposed of as will not require a sale of the property of which Pitt became the purchaser, until it shall become necessary by a failure to satisfy the debt by a sale of all of the trust estate which he did not purchase. The court dismissed Pitt without relief.

We do not see on what ground Pitt could intervene in the case until there was a final judgment against the defendants in favor of the plaintiff. If Pitt could have interfered at all, he should certainly have waited until there was a judgment for the sale of the property. But what equity is there in the prayer for relief? It does not appear but that he is a mere speculator. He bought the property subject to the encumbrance. All the property included in the trust deed was subject to the payment of the debt for which it was conveyed in trust. The portion bought by Pitt was subject to its proportion of the debt. He bought it thus encumbered. Where, then, can be the equity in removing the encumbrance for his benefit? Will the courts thus relieve against pur-

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Pittman v. Bass.

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chasers on speculation, and thereby enable men to acquire valuable estates at prices merely nominal?

The case as presented does not require us to determine whether when a large amount of property is conveyed to secure a debt much below its value, there is not some relief for a subsequent creditor. Ordinarily such a conveyance would, from the mere inadequacy of the consideration, be found to be fraudulent. But how can we see that in granting the relief prayed we are not putting valuable property in the hand of a purchaser for a mere nominal sum?

The judgment is affirmed, with a judgment of ten per cent. against Pitt. The other judges concur.



PITTMAN, Plaintiff in Error, v. BASS *et al.*, Defendants in Error.

1. Judgment affirmed.

*Error to Dade Circuit Court.*

*Colman & Ballou*, for plaintiff in error.

SCOTT, Judge, delivered the opinion of the court.

There is no point of law involved in this case. The only question was whether upon the evidence produced by the plaintiff he was entitled to recover. The only witness to the material facts of the case was Pitman, and giving all the force to his testimony to which it could be entitled and it entirely fails to make out the case presented by the plaintiff's petition. The other judges concurring, the judgment will be affirmed.

JOHNSON *et al*, Appellants, v. McALLISTER'S ASSIGNEE, Respondent.

1. Where a deed of assignment of goods is, on its face, in trust to the use of the grantor therein, it is fraudulent and void as against creditors, existing and subsequent, and purchasers; and the courts will so declare as a matter of law.
2. Where, however, the deed is not void on its face, and extrinsic evidence is adduced to show it to be fraudulent, the court will submit the issue of fraud, under proper instructions, to the jury, who will determine, as a matter of fact, whether the deed is fraudulent or not.
3. The fact that a deed of assignment gives the assignee the privilege of selling the assigned goods on a credit does not render the deed void on its face.
4. The thirty-ninth section of the act concerning voluntary assignments (R. C. 1855, p. 210) does not prevent a debtor from assigning his property for the benefit of a portion only of his creditors; said section operates to invalidate all provisions in such assignments which give preferences among the designated creditors; the designated creditors are entitled to be paid *pro rata* out of the proceeds of the assigned property.
5. The reservation to the grantor in a deed of assignment for the benefit of certain designated creditors of any surplus there may be after the payment of the debts of such preferred creditors does not render the deed void on its face.

*Appeal from Holt Circuit Court.*

H. Johnson and others in April, 1859, recovered a judgment against John B. McAllister. On the 20th of May, 1859, an execution was issued, placed in the hands of the sheriff, and levied the same day on a stock of goods as the property of said McAllister. After the sheriff had made this levy, George B. Chadduck claimed to be the owner of said goods by virtue of a deed of assignment executed by the said McAllister for the benefit of certain creditors. After two indecisive trials of the right of property by juries summoned by the sheriff—the juries disagreeing—it was agreed by all the parties that the sheriff should go on and sell the goods, and hold the money received therefor in his hands until the next term of the Holt circuit court, at which time the rights of the parties should be determined by the court upon a motion made by said Chadduck for an order requiring the sheriff

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Johnson v. McAllister's Assignee.

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to pay over the money received to said Chadduck. This motion was accordingly made.

At the hearing of this motion, the deed of assignment referred to above was read in evidence against the objection of plaintiffs. It is as follows: "This deed of assignment made and entered into this 20th day of May, 1859, by and between John B. McAllister, of the county of Holt, &c., of the first part, and George B. Chadduck, of, &c., of the other part, Witnesseth: That, whereas the party of the first part, being largely indebted to sundry and divers persons, and especially to these following, viz.: Oliver Bennett & Co., Woods, Christy & Co., [enumerating many others, but not specifying the amounts due;] and whereas said party of the first part is desirous to secure said creditors in the payment of the amounts due thereon from him; therefore, in consideration of the premises, and the further consideration of one dollar, &c., has this day and by this deed does bargain, sell, convey and deliver unto the party of the second part, the following personal property, viz.: All the stock of general merchandise now in the store of the party of the first part, in Oregon, Holt county, Missouri, consisting of dry goods, clothing, boots, shoes, hats, caps, millinery goods, hosiery, groceries, hardware, iron, nails and cutlery, together with the store fixtures; one roan horse; one buggy and harness. And the said assignee, party of the second part hereto, is required, as fast as may be, to sell said property at such times and on such terms as to him may seem best, so that the same shall be fully sold and settled up by the first of September, A. D. 1859; and as fast as may be to pay the parties herein secured the amount of indebtedness of the party of the first part on his individual account, and that is due and mature at this date; and after the payment of the expenses of this assignment and the debts herein provided for, said assignee shall pay to the party of the first part any surplus that may be in his hands. In testimony whereof, the parties, &c. [Signed] J. B. McAllister (seal), George B. Chadduck (seal.)"

This deed, as shown by the testimony of the clerk of the

Holt circuit court, who is *ex officio* recorder, the above deed of assignment was filed for record in the forenoon of the 20th of May, 1859; the execution, under which the levy was made, was issued by him as clerk in the afternoon of said day. Evidence was adduced to show that Chadduck was placed in possession of said stock of goods in the forenoon, and that McAllister was seen handling goods in the afternoon in the presence of another as if he was exhibiting them for sale. The amount of indebtedness of said McAllister to a portion of the creditors named in the assignment was proven, much exceeding the amount in the hands of the sheriff.

The plaintiffs moved the court to declare the law as follows: "1. The court will exclude from its consideration the deed of assignment read in evidence. 2. Said deed from McAllister to Chadduck is fraudulent *per se*, by virtue of the first section of the statute of frauds concerning fraudulent conveyances, because it reserves and creates a trust in favor of the grantor therein, and the law is for plaintiffs. 3. If the court believe from the evidence that McAllister remained in possession of the goods sold, and either sold or attempted to sell the same, then such is a fact from which the court may presume fraud in fact. 4. If the court believe from the evidence that said Chadduck never took the possession of said goods, and failed to give bond as such assignee, or otherwise qualify as such, then the law is for the plaintiffs. 5. Said deed is too indefinite and too uncertain in its terms to convey title to the goods mentioned therein, and for the proceeds of which this motion is filed. 6. Said execution so levied upon said property was prior in right to that of the assignee, if the court believe from the evidence that said Chadduck never took the possession thereof; and in such case, then, the law is for said plaintiff." Of these the court gave the third and refused the others.

*Vories & Vories*, for appellants.

I. The deed on its face shows that there were other creditors of the grantor therein not provided for by said deed; it

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also contains a trust reserved for the benefit of the grantor, which had the effect to render the deed *per se* void as to such creditors. (Goodrich v. Davis, 6 Hill, 438; Zeigler v. Waters, 24 Mo. 575; Burrill on Assignments, 393, 398; R. C. 1855, p. 802; Brooks v. Wimer, 20 Mo. 503; 24 Mo. 575, 581.) If the deed was not *per se* void as to creditors, the evidence clearly showed that there were other creditors not provided for in said deed, and that there was a trust reserved in favor of the grantor which would render the said deed void as to creditors. The court below therefore erred in admitting the deed in evidence and in refusing the declarations of law asked by the plaintiffs in the execution. The deed was also void under the second section of the statute, as being made to hinder and delay creditors. From the terms of this deed the assignee might have sold the goods on a credit, as he was to sell them upon such terms as he pleased. The deed was therefore void in tending to hinder and delay creditors. (Burr. on Assign. 385.) The deed was too uncertain on its face to convey any specific goods or property, unless at least they were actually delivered.

*Loan, Ryland & Son, and Davis*, for respondent.

I. The only point seriously contended for in the court below was the insufficiency of the deed of assignment to sustain the claim of the assignee, for the reason that it was void *per se* on account of the reservation of the latter part of the deed for the payment to the grantor of the surplus, if any, after paying the debts enumerated in the deed. That this is not a reservation to the use of the grantor within the statute, see Richardson et al. v. Levin, 16 Mo. 596.

SCOTT, Judge, delivered the opinion of the court.

We have never adopted in this state the course of decisions in New York under the statute concerning fraudulent conveyances. Our courts do not hear extrinsic evidence in relation to the validity of a conveyance, and then, on such evidence, as a matter of law, pronounce the conveyance void.

When a conveyance on its face is fraudulent and void, the court will declare it so. But when it appears to be fair, and its validity depends on extrinsic evidence, that evidence is submitted to a jury, who will determine, as a matter of fact, whether it is fraudulent or not.

We do not hold that a clause in a deed of assignment for the benefit of creditors, which requires the assigned effects to be sold on a credit, of itself renders the deed void. Such requirement is not of itself proof of fraud. The motive to such a requirement must be determined by circumstances. Cases may occur in which a sale on a credit might be advantageous to all interested. Our statute of assignments directs the courts to sell the assigned effects for cash in hand, or upon such reasonable credits as shall appear to such courts to be for the interest of all concerned. (R. C. 1855, p. —, sec. 31.)

The last section in our assignment law, it has been held, does not prevent a debtor from giving a preference to some creditors over others, though that section prohibits any discrimination amongst those that may be included in the deed. (Shapley v. Baird, 26 Mo. 322.)

The reservation to the grantor of any surplus after satisfying the preferred creditors does not avoid a deed of assignment. Such a reservation is no more than the law implies. The surplus would belong to the debtor whether the deed contained the reservation or not, and under our system of practice it may readily be reached by a creditor. But there may be no surplus. Shall a deed be declared void because it contains a provision which effects nothing? (Richards v. Levin, 16 Mo. 598.)

As the trial of the issue was submitted to the court its finding will not be disturbed, according to the practice of this court. Affirmed. The other judges concur.

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McNeeley v. Hunton.

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## McNEELEY, Respondent, v. HUNTON, Appellant.

1. To constitute a person a trespasser in the wrongful seizure and removal of the property of another, it is not necessary that he should actually participate in the act of seizing and removing; if he directs or assents to the trespass—as by directing the sheriff to levy an execution upon such property—he is liable as a trespasser.
2. Where it was the uniform practice of a circuit court not to try cases reversed and remanded by the supreme court at the first term next after such reversal, *held*, that it was no error to continue such cause at such term.

*Appeal from Dade Circuit Court.*

This case has heretofore been in the supreme court. (See McNeeley v. Hunton, 24 Mo. 281.) It was reversed and remanded in behalf of the defendant at the January term, 1857, of the supreme court. At the August term, 1857, of the circuit court, the defendant moved the court to dismiss the cause on the grounds that he, defendant, was ready for trial; that plaintiff had not asked, and filed affidavit, for a continuance; that plaintiff would not then proceed to trial; that plaintiff offered no reason for a continuance. The court overruled the motion. The court overruled the motion on the "ground that it was the practice of *this* court not to try any cause at the first term after it is sent back from the supreme court." The same motion was made at the next term.

A change of venue was taken from Benton county to Dade county. The nature of the action is sufficiently apparent from the opinion of the court.

*Ryland & Son*, for appellant.

I. The court erred in refusing to give defendant's last instruction, as the testimony clearly shows that the plaintiff's son, William McNeeley, carried the horses to Warsaw and the sheriff took them and sold them there. The simple act of a plaintiff in execution bidding for property at sheriff's sale does not make him a trespasser, and Hunton is sued in this case as a trespasser. The court should have dismissed the plaintiff's suit for neglecting to prosecute it, as the law

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required, instead of permitting her to continue it without any cause or any motive therefor, or any reason given therefor, an arbitrary continuance.

*Johnson & Ballou*, for respondent.

I. There is no error in the decision of the circuit court in not requiring the plaintiff to be ready with witnesses to prosecute her suit at the first term after the judgment of reversal of it had been filed in the circuit court. The practice has been to the contrary, and it has arisen from the fact that it can not be known what course will be taken until the first term. The plaintiff may wish to amend or to dismiss; the issue may have to be changed; and this general rule has been adopted and is known to the attorneys, and it has been conformed to. It is not an error that defendant can complain of.

II. The instructions given on the part of the plaintiff put the case as fairly before the jury upon the pleadings and evidence as the defendant could ask. The instruction that the court refused on the part of defendant is not law. To make defendant liable it is only necessary that he should direct or assent to a trespass, and he did both. This question was not and could not be an issue before the jury, whether or not he seized, took and led away the horses; he put in a plea justifying the taking, and admitted the taking of the same horses sued for, and alleged that they belonged to Burns.

III. The court should affirm the judgment. There is no error committed to the injury of the defendant.

IV. And we insist that the court should give plaintiff damages in this case at ten per cent. It has been delayed at defendant's instance one whole year in this court, and the ground for an appeal is a mere pretence.

EWING, Judge, delivered the opinion of the court.

This was an action against the defendant for the alleged taking and carrying away of certain horses, the property of the plaintiff, and causing them to be levied on and sold by the

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sheriff of Benton county. The answer denied seizing and taking away the horses as charged in the petition, but alleged that the horses mentioned in the petition were the same that were sold under an execution in favor of defendant and against one James Burns, and that they were the property of said Burns and not of the plaintiff. The errors assigned are the giving and refusing instructions and overruling defendant's motion to dismiss the cause. The instructions given on the part of the plaintiff presented to the jury fairly and clearly the law arising upon the pleadings and evidence. The questions for the jury were whether the horses were the property of the plaintiff, and, if so, did the defendant cause them to be levied on and sold as the property of the execution debtor Burns? These points were submitted to the jury in the first instruction given for the plaintiff.

The second instruction was based upon evidence touching the agency of Burns in purchasing the horses in controversy, and declared that although Burns may have purchased them, yet if, in doing so, he was the plaintiff's agent, and the money for that purpose was furnished by her, she is entitled to a verdict. This instruction needs no comment; it was obviously correct. All the instructions asked by the defendant were given except the following, namely: "That unless the defendant seized, took and led away the horses in plaintiff's petition mentioned, they should find the issues for defendant." This instruction erroneously assumes that the defendant could not be a trespasser without an actual participation in the act of seizing and removing the property from the owner's possession. It is hardly necessary to say that such is not the law, and that he who directs or assents to a trespass is liable equally with him who does the act which constitutes the trespass. If the defendant caused or directed the horses to be levied on and sold, he was a trespasser, notwithstanding he may not actually have taken them from plaintiff's possession, or aided in doing so. Although the answer may not be considered as admitting the allegation of the petition that defendant directed the property to be

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levied on and sold, yet there was evidence conducing to show this, and it warranted the instruction that was given for the plaintiff.

As to the other point respecting the dismissal of the cause, it is sufficient to say that this ruling was shown to be sanctioned by the uniform practice of the court, and, without passing upon the propriety of such practice, we can not say that the court erred in refusing to make the plaintiff an exception to the rule, a rule with which both parties are presumed to have been equally cognizant. The rule being not to try a cause reversed and remanded by this court until the second term after such reversal, we suppose that at the first term thereafter the cause would be continued as a matter of course, without a formal application therefor by the party. Such we understand was the disposition of this cause in the court below.

Judgment affirmed; Judge Napton concurring. Judge Scott absent.

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WALLACE, Respondent, v. WILSON *et al.*, Appellants.

1. One B. held a receipt issued to him by the receiver of the United States land office upon the entry by him of a tract of forty acres; also the register's certificate of the location by him of a military land warrant. No patents had been granted by the United States. B. assigned said receiver's receipt to W. by written endorsement as follows: "For value received, I assign the within to W. as collateral security, this 15th day of May, 1857. [Signed] B." At the same time he assigned the register's certificate by an endorsement identical with the above, with the exception that it was assigned "as counter security." *Held*, that parol evidence might be adduced to show that these assignments were made to secure two certain promissory notes executed by said B. in favor of said W.; that the said assignments created an equitable lien or mortgage in favor of W. upon the lands embraced in said receipt and certificate.
2. To entitle a person to invoke the aid of the rule that protects a *bona fide* purchaser as against a prior equity, it must appear that he made his purchase and paid the purchase money before he had knowledge of such prior equity; he should in his answer be full and explicit as to the time and terms of his purchase, and the payment of the purchase money.

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*Appeal from Bates Circuit Court.*

Elisha Blevins and Willis J. Peak were indebted to Thomas B. Wallace upon two promissory notes, each for \$616.86, one dated May 14, 1857, payable in three months; the other dated May 15, 1857, payable in six months. Said Blevins was in possession of a receiver's receipt, issued to him by the receiver at the land office at Warsaw, Mo., on the entry by him of a tract of forty acres. This receipt was dated March 24, 1856. He also was possessed of a register's certificate of the location by him of a military land warrant at the same office. The land warrant was for one hundred and twenty acres; it was dated May 1, 1856. Said Blevins assigned said receipt by endorsement, as follows: "For value received, I assign the within to Thomas B. Wallace as collateral security, this 15th day of May, 1857. [Signed] Elisha Blevins." The register's certificate was assigned by endorsement, as follows: "For value received, I assign the within to Thomas B. Wallace as counter security, this 15th day of May, 1857. [Signed] Elisha Blevins." Wallace recovered judgments against said Blevins on said notes. On the 21st of July, 1857, Blevins conveyed the tracts of land embraced in said certificate and receipt to Simeon Wilson. By the deed the said tracts were described by the section, fractional section, township and range. The receipt of the consideration was recited.

Plaintiff, Wallace, seeks in this action to subject the land in Wilson's hands to the payment of the said promissory notes. He prays the foreclosure of his equity of redemption and the sale of said land. He alleges in his petition that the defendant Wilson purchased with notice of his equitable mortgage. Parol evidence was introduced by plaintiff to show that the debts intended to be secured by the assignment of the receipt and certificate were those evidenced by the promissory notes above referred to.

The court found in favor of plaintiff, that the defendant purchased with notice of plaintiff's equity, and decreed the sale of the land.

*Colman & Ballou*, for appellants.

I. The facts alleged in the petition, or proven, do not and should not constitute a cause of action. The doctrine of equitable mortgages created by a deposit of title deeds or legal titles, from its first inception in England, has been lamented, and never has been recognized in this state, and has been repudiated in Kentucky; (*Vanmeter v. McFadden*, 8 Mon. 438; *Bowers v. Oyster*, 3 Penn. 239;) also in Pennsylvania. (3 Barr, 233; see 19 Ves. 211; 11 Ves. 403; 8 Greenl. 250; 2 Story Eq. § 1020; 1 R. C. 1855, p. 364, § 40, 41, 42.) Parol mortgage is not good. The duplicate and certificate of the land warrant are not legal titles, or title deeds at common law, and their mere deposit, without any thing more, would not constitute an equitable mortgage. This would be going beyond the English doctrine, and the courts of England have refused to extend it. If, then, this duplicate and certificate are not at common law legal titles, a deposit, even with a parol agreement showing for what debt, &c., it was deposited to secure, would not constitute the deposit an equitable mortgage even in England, and should not in this state. But if it be insisted that the assignments constitute a legal mortgage, they are void, not being under seal; nor are they any conveyance of the land, and are also void for uncertainty, not specifying for what demand, or debts, or the amounts, to whom or when due, nor where payable, as it requires parol testimony to establish all these facts, which is not allowable under the statute of frauds and perjuries in this state. (R. C. 1855, p. 806; 7 Mo. 389; 11 Vesey, 403; 1 Ham. 281.) Even if the deposit of title deeds should be allowed to operate or constitute an equitable mortgage, it should not be extended to an assignment and deposit of duplicates and certificates of location of land warrants. (4 Litt. 169.) This deposit, as it is termed, and the assignments as they are, must be an interest in land, or else it is no lien, and should have been so fully reduced to writing as to make it valid and good against the statute of frauds and perjuries. One assignment is as "collateral" and

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the other as "counter;" "counter security" is not collateral. It can not be construed as meaning collateral but contrary; but the court changed its meaning and made the land in this certificate of location liable also for the debt, and that, too, upon parol testimony. If it be true that it is ambiguous, parol evidence in this case ought not to be allowed to utterly change its meaning, and the court should have pronounced that assignment at least void.

II. Wilson had no notice that the plaintiff had any claim in the lands. (8 Johns. 137; 4 Kent, 172; 3 Ves. 472; 2 Atk. 275; 2 John. Ch. 181; 12 John. 452; 3 Pick. 149.) The defendant proves fully by the deeds that he was a purchaser for a valuable consideration as well as by other testimony, and the plaintiff has not proved that he had any notice of his particular claim. The purchase was made in June and a title bond from Blevins to Wilson was first taken. Wilson gave his notes for it; afterwards the deeds were made in July, which recited the payment of the purchase money, and these recitals are evidence of payment till the contrary is proved; and all this took place before any suit was brought. Defendant could not prove the payment except by the deeds; he could not by Blevins, for he is a co-defendant. When the defendant took possession, the plaintiff should have notified him of his claim, and if this had been done before the purchase money was paid, then there might have been some pretence to hold this land liable.

*Hicks*, for respondent.

I. The assignments of the land certificates and their delivery by Blevins to respondent, and the agreements then made, constituted a good equitable mortgage. (Sto. Eq. § 1020; *Rockwell v. Hobbs*, 2 Sandf. Ch. 9; *Welch v. Usher*, 2 Hill, S. C., 167; 10 Sm. & Marsh. 418; 4 Kent Com. 154.) Appellant at the time of his purchase from Blevins had notice of respondent's lien on the land. In fact the answer does not deny notice. (8 Mo. 303; 4 Mo. 62.) The purchase money was not paid before the institution of this suit, if it has ever been paid.

NAPTON, Judge, delivered the opinion of the court.

The doctrine of equitable mortgages created by a transfer of the possession of title papers from a debtor to his creditor is not involved in the consideration of this case. The objection to that doctrine was, that it annulled or disregarded the statute of frauds; yet it was firmly established in England, despite of the doubts of eminent chancellors, and in this country, according to Judge Story and Chancellor Kent, has been pretty generally adopted. The case before us, however, requires no investigation of the subject. It is not a deposit of legal title papers, with a parol agreement that the transaction shall be considered a mortgage. The legal title was in the United States. The only evidences of title was a receiver's receipt for forty acres of the land, and the certificate of the register for the location of one hundred and twenty acres under the military bounty land, act of March 3, 1855. These papers were assigned to the plaintiff, by endorsement in writing, as collateral security, and the papers with their endorsements were delivered to plaintiff.

The parol evidence given on the trial, explanatory of the object of the assignment and the circumstances attending it, was unobjectionable. The testimony does not vary or contradict the effect of the writings, or add any thing to their validity. Where an absolute deed is converted into a mortgage by parol evidence, there is certainly, to say the least, an apparent contradiction between the written instrument and the parol testimony, yet this may be done according to the weight of authority now. Here the assignment on its face purports to be made only as collateral or counter security, and these terms may with propriety be explained.

But it is not material to the defendant whether the assignment was absolute or conditional. If it was absolute, his case is certainly not made any better, and to prove that it was conditional can not be productive of any injury to him. The main question, upon which the merits of the case depend, is whether the defendant Wilson is a *bona fide* pur-

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chaser of this land from Blevins, without notice of plaintiffs' title. This question, under the old chancery practice, if tried by the chancellor without a feigned issue before a jury, would have been determined, not only by the testimony, but to some extent by the weight to which the defendant's answer might have been entitled. The defendant, to obtain the protection afforded to a purchaser for a valuable consideration without notice, was not allowed to rely upon mere general denials of notice. It was not sufficient for him to deny notice at the time of the purchase, but he must deny notice before payment; and if the purchase money was secured by notes, and the notes were unpaid, the plea was not good. (*Jewitt v. Palmer*, 7 John. Ch. 18; *Halsa v. Halsa*, 8 Mo. 303.) A party, occupying the position of dealing with another who was undeniably guilty of a fraud, was regarded as not entitled to the protection of a court of equity, unless he candidly disclosed all the facts which were peculiarly within his knowledge. It was easy for him to state the terms of his contract and the dates and amounts of his payments. It was easy for him to state whether the payments were in money, or in property, or in notes. In short, courts of equity required him to show that he would be injured by enforcing the plaintiff's demand against him; and if, in truth, nothing had been paid when the proceeding against him was commenced, or there was still any thing due, or he had made payments after he received notice of plaintiff's title, his plea of want of notice did not avail him.

It would be perhaps a mere matter of speculation to say what ought to be considered necessary in such answers under our present practice. A specific denial of such material allegation is all which the act in terms requires, unless there be new matter to allege or a counter claim to set up. It can not be said that the matter we have alluded to could be regarded as new matter of defence, and it certainly has none of the characteristics of a counter claim. A simple denial, therefore, of the plaintiff's allegations must probably be regarded as sufficient. But however the rule of pleading may

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be, it is clear that if the defendant relies on his simple denial and fails to give any evidence supporting it after the plaintiff has made out a *prima facie* case against him, he must occupy a very unfavorable position with the tribunal selected to try the issue of notice.

In this case, two of the plaintiff's witnesses state that the purchase by Wilson was on time; that no money was paid when the contract was made. One of these witnesses states that two notes were given by Wilson—one payable in November, 1857, the other in November, 1858. The defendant offered no evidence whatever on this point, although he had two depositions taken of witnesses who were also present when the bargain between him and Blevins was made. Their answers to leading interrogatories was simply in effect and in words that the sale was made in good faith and upon no conditions, without giving any facts. No witness proves the payment of any of the purchase money at any time, nor is any such payment unequivocally alleged in the answer. It is averred that the defendant at the time of the purchase, and at the time of the payment "*or assuming debts to others for Blevins,*" and at the time of the conveyance, had no knowledge or information of plaintiff's claim or title. This expression seems to justify an inference that at least a portion of the purchase money was not paid down, but that the defendant assumed to pay certain liabilities of Blevins, and that this assumption of his was one of the means by which the purchase money was to be paid. It is not stated, in the answer, nor was any evidence offered on the trial of the issue, to show how much of the purchase money was to have been paid in this way, when these liabilities became due, or whether they were due at the time of the commencement of this action.

The defendant, in his answer, relies altogether upon the fact that Blevins was in possession of the land, and in his evidence he relies solely upon the production of his deed. The latter can not be regarded as entitled to any weight in

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opposition to the proofs produced by the plaintiff and the admissions made in the answer.

Possession of land, it is to be observed, is not upon a footing with the possession of personal property, when a question is raised as to title. Although when a man buys a tract of land from a vendor who is out of possession, that circumstance has been allowed to go in evidence as proof of notice, or as a fact which should have put the purchaser upon inquiry; it is a very different matter for a purchaser to resort to this fact as evidence of his want of knowledge of the condition of the title of the party in possession, and from whom he is buying. The only effect which possession of land can with propriety be allowed is to put a party upon inquiry; he is not of course to take the title as being with the possession, and if he is treating with the party in possession, he would be presumed to make some inquiries about the title. Lord Erskine observed, in a case of this kind: "There is a marked distinction in this respect between a real estate and a personal chattel. The latter is held by possession; a real estate by title." It may be by lease or only from year to year. The cases have gone upon that distinction. Is there any instance of a purchaser upon mere possession? If the vendor, being asked, acknowledges to the purchaser that the deeds are in the possession of another, who is to be postponed? Here is *crassa negligentia*." The Lord Chancellor afterwards adverted to the distinction between such cases and those in which the vendor is out of possession, and considers the cases as not conflicting, but maintaining the same general principle. He refers to the explanation of Lord Rosslyn, in *Taylor v. Hibbert*, 3 Atk. 294, in reference to a purchaser of an estate from the owner, knowing it to be in possession of tenants and not inquiring into the character of estate the tenants had, and adds: "No comparison can be made between these cases and the case now before the court with respect to the strength with which the principle applies. I repeat, that land is held not by possession, but by title;

not so as to personal chattels ; for the common traffic of the world could not go on. Therefore a sale in market overt changes the property of a chattel ; and that rule, that possession is the criterion of title to a chattel, has been adopted in the bankrupt acts ; so that, if the owner has permitted the bankrupt to be the visible proprietor, the property is divested ; for no one can distinguish the property except by the possession. But that is not so as to land, for no person in his senses would take an offer of a purchase from a man merely because he stood upon the ground. It is not even *prima facie* evidence. He may be a tenant by sufferance or a trespasser. A purchaser must look to his title, and if, being asked for the deeds, he acknowledges he has not got them, the purchaser is bound to further inquiry." (Hirn v. Hill, 13 Ves. 119, 121.) These remarks of Lord Erskine are not referred to as indicating the precise rules prevailing in our courts in reference to the doctrine of notice, either as it regards real or personal property, but they show how little weight is to be attached to the mere fact of Blevin's possession as evidence in favor of the defendant. They show that this circumstance rather operates against his case, and in England would be held to authorize a decree against him. In this country, the rule would not be so harsh, for the custom in reference to title deeds is not the same as in England. Taken in connection with the other circumstances of this case, the fact that Blevins was in possession of the land and could produce no evidences of title whatever, is calculated to produce an unfavorable impression of the defendant's course. An inquiry, it seems, was made for the "duplicates," as the certificates of the land officers were termed ; but they were not produced, for the plaintiff was in possession of them. Under many circumstances this incident would have but little weight with a court ; but when it is seen that Blevins and Peak had been in partnership as traders ; that Peak was notoriously insolvent ; that Blevins' liabilities, outside of his indebtedness to plaintiff, were assumed by the defendant, it is not certainly strange that the defendant would be willing

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to conclude a purchase of a tract of land, pay the purchase money, and rely upon the deed of Blevins, without any other evidence that he had any title than his bare possession of the land.

Several of the statements in the defendant's answer are singularly confirmatory of his gross negligence in acquiring information concerning the condition of the title. These statements are as follows: "This defendant further states that he has no sufficient knowledge or information to form a belief whether or not said Elisha Blevins, at the time the notes mentioned in plaintiff's petition are alleged to have been executed, was or was not the owner of the north-east quarter of the south-west quarter of section number eight, township forty-two, range twenty-seven, containing forty acres; nor has any knowledge or information as to the title of said Blevins. This defendant has no sufficient knowledge or information to form a belief whether or not said Elisha Blevins, at the time the notes mentioned in said plaintiff's petition are alleged to have been executed, was or was not the owner of the south-west quarter of the north-east quarter, and the north-west quarter of the south-east quarter, and the north-west quarter of section number eight, township forty-two, range twenty-seven; nor any knowledge or information sufficient to form a belief as to the title of said Blevins at the time." "This defendant has not sufficient knowledge or information to form a belief as to the allegation in plaintiff's petition that Blevins never had any title deed or deeds to said land except said duplicate receipt and the said certificate of location." Considering that the defendant purchased this land in less than two months after the date referred to in his answer, his utter destitution of all information concerning the title ought, at least, to convict him of gross negligence. If Blevins had misled him by false statements concerning the custody and transfer of the certificates, why not say so? Why not disclose the facts so that the court can see how he was misled, and how he would be injured, if he should be considered as having been in collusion with Blevins?

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The conclusion from the evidence and from the answer is, beyond all doubt, that the purchase money was not all paid at the execution of the conveyance. The defendant admits this by conceding that a portion of the payment, at least, was an assumption of Blevins' liabilities to others. It was in the power of the defendant to have made the facts concerning the times and modes of payment entirely certain. He has not thought proper to introduce any evidence on the subject. If the testimony of the plaintiff's witnesses is to be relied on, one of the notes given by the defendant was not due for nearly a year after this suit was brought, and the other had only fallen due for less than a month. Under these circumstances, we do not feel disposed to express any dissatisfaction with the finding of the circuit court. We think the court ought to have submitted the question to a jury; but as the court did not think it necessary to do so, and after hearing the evidence has found the issue against the defendant, we can not say the finding ought to have been otherwise. On the contrary, we should come to the same conclusion on the evidence. But we would have preferred, as before observed, that this disputed question of notice had been left to the jury.

Judgment affirmed. The other judges concur.

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McPHERSON, Defendant in Error, v. MEEK, Plaintiff in Error.

1. To constitute a bond signed by a person a valid bond against him, it must be shown to have been delivered to the obligee.
2. Where a person, alleging that he had as surety for another paid a bond in which the latter was principal, seeks to recover the sum so paid of the alleged principal, he must show that he became a party in the character of surety at the instance of the alleged principal, or that the latter assented to it, unless this fact appear from the instrument itself.
3. Nothing can be set up as a counter-claim, which is not a cause of action, a cross demand, and that does not contain the substance necessary to sustain an action by defendant against the plaintiff, if the plaintiff had not sued the defendant.

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*Error to DeKalb Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Shambaugh*, for plaintiff in error.

I. The court erred in striking out that part of the answer relating to the non-delivery of the bond. If after defendant had signed the bond, he declined giving the same, and plaintiff afterwards, contrary to defendant's direction, delivered the bond to the county, plaintiff can not recover the amount he paid on the bond. So also the court erred in striking out that portion of the answer charging that plaintiff signed the bond as security without the knowledge or consent of the defendant. (2 Greenl. Ev. p. 93; 19 Mo. 170.) So also in striking out the defence of fraud. If the plaintiff fraudulently procured defendant's signature to the bond for the purpose of paying a debt due by plaintiff to the county, instead of a debt due by defendant, as intended by defendant, he can not recover. The court improperly struck out the defence of mistake. The defences are not inconsistent. Even if they were, a motion to strike out was not the proper remedy. Such an objection applies to the whole answer. The proper remedy is a motion to compel the defendant to elect. The court erred in striking out defendant's set-off. The fact that the amount claimed was due from plaintiff and another does not deprive defendant of the privilege of using it as a set-off when sued by plaintiff alone. (*Whaley v. Cope*, 4 Mo. 233; 8 Mo. 309; 24 Mo. 306.) The defendant could have maintained an action for the debt against plaintiff alone. (4 Mo. 233.)

EWING, Judge, delivered the opinion of the court.

This was a suit to recover the sum of \$161.94, which plaintiff alleges he paid for the defendant as his security on a bond executed by them, (defendant being principal,) with one Hudson, to the county of DeKalb for the use of the road and canal fund. The petition alleges that the bond bore date

January 4, 1858, and was for \$142.14, payable in twelve months; and that, defendant making default, plaintiff paid said sum with interest January 19, 1859.

The answer denied the execution of the bond as charged, and that plaintiff paid the sum claimed; admitted that the defendant signed the bond, but denied the delivery of it; and alleges that the bond was signed by plaintiff as surety without the knowledge or consent of defendant, and was delivered by plaintiff contrary to defendant's direction; charges that plaintiff fraudulently procured defendant's signature to the bond for the purpose of paying a debt owing by plaintiff to said county, instead of paying a debt due by defendant to said county, as intended by defendant; also that defendant signed the bond under a mistake as to the purpose of giving the same, and that plaintiff afterwards, contrary to the direction of the defendant, fraudulently delivered the bond to said county in payment of a debt due from plaintiff to the county. The defendant also pleaded a set-off due him from plaintiff, and also a counter claim, as the answer terms it, of \$96.50 against the firm of McPherson & Harvey, of which plaintiff was a member.

That part of the answer setting up the non-delivery of the bond is a good defence to the action, and should not have been struck out. The answer avers that the bond was never delivered by the defendant as his act, nor by any one authorized by him, and that it was delivered by the plaintiff to the county court without his knowledge or consent. If these facts are established, it is clear the defendant would not be liable. The instrument, although signed by the defendant, as he admits, was incomplete and created no liability as against him without delivery, although it may have been binding on the other parties to it. In such actions as this the plaintiff must prove the original obligation, by proof of the bond, agreement, or other instrument by which he became a surety. One of the essential constituents of an obligatory instrument, to-wit, the delivery, is alleged by the defendant to be wanting; and upon such an issue the *onus* of

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proving the delivery would devolve of course on the plaintiff. This was the issue tendered by the answer and struck out, we think, improperly by the court.

As to the allegation in the answer that there was no request that the plaintiff should become Meek's surety, it may suffice to say, that unless this fact appear from the instrument itself, as executed by defendant, proof must be given that the plaintiff became a party at the instance of the defendant in the character of surety, or that he assented to it. (2 Stark. Ev. § 773; Pittman, Price & Surety, 232.)

As to the part of the answer alleging plaintiff's fraud in procuring defendant's signature to the bond in question, we are of opinion the facts set forth wholly fail to make out a case of fraud, and if proved would furnish no ground for vitiating it as respects the defendant. He states what his own understanding was in reference to the purpose for which the bond was to be given, but does not aver that the plaintiff was a party to such understanding, or ever assented to it, or that he, by any false representation or concealment or otherwise, misled or deceived him as to the nature of the transaction, or the object had in view in executing the instrument. We are also of opinion, that the matters as pleaded in that part of the answer alleging a mistake in executing the bond do not constitute a defence to the action.

That portion of the answer pleading what is called a counter claim of \$96.50 was properly stricken out. So far from the items constituting it being an indebtedness due from the plaintiff to the defendant, they are expressly stated to be *payments* made to the plaintiff on a preëxisting debt due to the firm of McPherson & Harvey, of which plaintiff was a member. If the firm was suing for this debt, these items would be pleaded by the defendant as payments; but such is not this suit, nor is plaintiff seeking to recover any debt or demand due the firm of McPherson & Harvey. They are not well pleaded as payments in this action, because the debt, which it is alleged they were paid to discharge, the plaintiff does not seek to enforce or recover; and no ques-

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tion as to how such payments were applied, or whether credited or not on the defendant's debt, could arise in this suit. They are not properly pleaded as a counter-claim, because they obviously have none of the characteristics of such a claim. They constitute no *cause of action*, upon which he might have maintained a suit against the plaintiff; and nothing is a counter-claim which is not a cause of action or a cross demand, and that does not contain the substance necessary to sustain an action by defendant against the plaintiff, if the plaintiff had not sued the defendant. (3 Kernan, 252.)

Judgment reversed and the cause remanded; Judge Napton concurring. Judge Scott absent.

PEERY, Plaintiff in Error, v. KERR *et al.*, Defendants in Error.

1. A., B., C. and D., by written agreement, bound themselves "each to the others," that they would purchase a steamboat, contributing in equal shares to the payment of the purchase money, A. to act as master of the boat when purchased, and B. as clerk. The agreement contained this further provision: "And it is further agreed between the parties, that should any of them at any time after said purchase desire to sell his interest in said boat, the other parties to this agreement, or such of them as may have an interest in said boat at the time, or such person as a majority of them may select, may have the preference in purchasing said interest, provided he or they so proposing to purchase will do so on the same terms that the party so wishing to sell may be able to obtain from the other parties." *Held*, that this agreement was several only; that each party bound himself to the others, and that two of said parties could not be sued jointly by a third for a breach of the above stipulation.

*Error to Chariton Circuit Court.*

On the 28th of July, 1858, Andrew L. Kerr, Jasper M. Perry, Joseph F. Dickey and Ambrose M. Day entered into an agreement as follows: "The aforesaid parties do hereby agree and bind themselves, each to the others, in

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the sum of five thousand dollars, that they will purchase the steamboat David Tatum, or some other steamboat which may be selected by a majority of said parties, said purchase to be made as soon after this time as can conveniently be done, and said boat, when purchased, to be used in the Missouri river or any other of the western waters in a general carrying business of freight and passengers; and the said parties do agree, each with the others, that they will contribute in equal proportions to the payment of the purchase money of said steamboat. And it is further agreed that the said Peery shall be the master of said boat when so purchased, and the said Kerr shall be the first clerk thereof, and shall have the appointment and control of the under-clerks so long as the said Peery and the said Kerr may respectively wish to occupy said positions, and it may not be contrary to the wishes of a majority of the owners. And it is further agreed between the parties, that should any of them at any time after said purchase desire to sell his interest in said boat, the other parties to this agreement, or such of them as may have an interest in said boat at the time, or such person as a majority of them may select, may have the preference in purchasing said interest, providing he or they so proposing to purchase will do so on the same terms that the party so wishing to sell may be able to obtain from other parties. And the said parties bind themselves each to the others, in the sum of five thousand dollars, faithfully on his part to perform all the agreements herein contained. Given under," &c.

This is a suit by Peery against Kerr and Dickey. The petition, after setting forth the above agreement, proceeds to allege in substance as follows: That the parties to the above agreement purchased the steamboat David Tatum jointly; that plaintiff took command; that Kerr acted as clerk; that the said boat was used by the parties in navigating the Missouri river until about November 1, 1858, when plaintiff and defendants, Day consenting thereto, agreed between themselves to sell their interest; that plaintiff and Dickey execu-

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ted separate powers of attorney to defendant Kerr authorizing him to sell their interest; that plaintiff executed said power of attorney in full faith that his interest would be sold jointly, so that all said parties should be divested of their interests and neither remain owner with other persons; that the defendants fraudulently and contrary to the express agreement of the parties, and without advising with plaintiff and getting his consent, sold their entire interest to one Williams, without including the interest of plaintiff in said sale; that without consulting plaintiff, and in fraud of his rights, defendants placed the boat in charge of said Williams as captain; that defendants knew Williams was insolvent; that in consequence of said fraudulent collusion, and by reason of the carelessness and mismanagement of said Williams, said steamboat lost money and was subsequently sold for debt; that the money arising from said sale was insufficient to pay all the demands against the boat; that plaintiff has become responsible as part owner for large sums of money, and has lost his interest in the boat.

The court sustained the demurrer to the petition.

*Shackelford & Turner*, for plaintiff in error.

The demurrer was improperly sustained. The contract is set forth as the inducement to the action, and the injury complained of resulted from the joint fraudulent acts and by the collusion of defendants. Under the old rules of practice an action on the case could clearly have been maintained on the alleged state of facts. (Chitty on Pleading, 154.)

*Harris*, for defendants in error.

I. The amended petition does not state facts sufficient to constitute a cause of action. If the agreement filed with the petition and the alleged breach of the stipulations therein are alone relied on, then there is no cause of action, because the petition shows that both defendants sold their shares with the consent of each other, and that Day had agreed to

a sale by them. The defendants and Day constituted a majority, and the agreement authorized a sale whenever a majority should consent. If a breach of the second agreement referred to in the amended petition is the ground of the action, it is insufficient, because there was no consideration for such agreement. The alleged agreement between the parties to the action that they would sell jointly did not constitute mutual promises in a legal sense, so that a promise by one would be a consideration for the promise of another. Such agreements would not be binding, and either party would have a right to recede from it until something had been done under it affecting the rights or the interests of the other parties. If both agreements are relied on, then there is a misjoinder of causes of action; a cause of action upon one could not be united with a cause of action upon the other. They would not belong to either one of the classes mentioned in the practice act. If the causes of action are properly united, they are not separately stated, with the relief sought for each, in such manner that they can be distinguished.

II. There is a misjoinder or multifariousness in this, that a joint judgment is asked against both defendants for the separate acts of each. The defendants are bound separately and not jointly under both agreements; and if the action is for a breach of the agreement, as well as for the alleged combination to defraud, then the petition is multifarious. By the written agreement each party was bound severally to the others jointly.

Scott, Judge, delivered the opinion of the court.

There is but one cause of action stated in the petition, and that is founded on the written agreement. The agreement is several only. Each party binds himself to the others. They did not intend to become sureties for each other. Each defendant is separately liable to all the others for his own acts. If this action can be sustained, then the defendants

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are made liable for each other, whilst their undertaking was several. Actions should have been commenced against each defendant violating the agreement.

Affirmed. The other judges concur.



BROWNING, Plaintiff in Error, v. CHRISMAN, Defendant in Error.

1. No dismissal of a suit as to a party thereto should be allowed, when it will produce derangement in the rights of the defendants, deprive them of a legal defence, or subject them to increased difficulties or liabilities.
2. In equity there may be a decree against one defendant in favor of a co-defendant.
3. B. conveyed certain real estate to D. with covenants of warranty. D. instituted an action of ejectment against C. to recover possession thereof. C. set up in his answer as a defence to this action a prior purchase by himself of said real estate from B.; that he had taken possession and paid a portion of the purchase money; that B. had executed a deed of said real estate to him, but fraudulently refused to deliver it; that D., fraudulently contriving and confederating with B., obtained a deed from the latter. C. offered to pay the remainder of the purchase money, and prayed for a decree of title against D. and B.; that B. be made a party to the action; and that an order of publication be made against B., he being a non-resident. An order of publication was made against B. The court, by its decree, vested the title to the real estate in controversy in C., annulled the deed of B. to D., and decreed that C. should pay to B. the balance of the purchase money, and gave judgment against B. and D. for costs. Afterwards B. presented a petition to the court, under the provisions of the thirtieth article of the practice act of 1849, (Sess. Acts, 1849, p. 103, § 8—11,) praying the court to set aside the decree, and for leave to file an answer. This motion was accompanied by an affidavit denying specifically the allegations contained in the answer of C. The court granted leave to B. to file an answer; which leave was acted upon by the latter. Afterwards C. filed a motion setting forth that the original action of D. against him was an action of ejectment; that he, C., set up an equitable defence praying for a decree of title and that B. might be made a party; that he was accordingly made a party and a decree rendered in favor of C.; that said B. was not and is not a necessary party; and praying the court to set aside the judgment or decree as to said B. and strike his name out as a party, leaving the judgment in full force against D. The court sustained the motion, and the judgment rendered in the suit of D. against C. and B. was set aside as to B., the court directing that the case should be "left open for B. to pursue any remedy

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he may have against C., as though he had never been a party to the original suit of ejectment instituted" by D. against C. The court dismissed the petition.

*Held*, That this action of the court was erroneous; that B. would be injuriously affected by the decree, his deed to D. being a deed with covenants of warranty; that B. had a right to come in and plead to the original action.

*Error to Howard Circuit Court.*

This cause grows out of an action of ejectment brought in the Moniteau circuit court in February, 1856, by T. E. Dickerson against David Chrisman, to recover possession of certain real estate in the town of California. In this suit the plaintiff claimed title by virtue of a deed from one Browning. The defendant Chrisman set up an equitable defence, alleging a prior purchase by himself from Browning; that he took possession under said purchase and paid a portion of the purchase money; that Browning executed a deed to him but fraudulently refused to deliver it; that the plaintiff Dickerson, knowing these facts, confederated with Browning and fraudulently obtained a deed from said Browning to himself. Defendant Chrisman offered to pay the balance of the purchase money, and prayed for a decree of title against the plaintiff Dickerson and Browning; that Browning might be made a party to the action; that an order of publication might be made against him, he being a nonresident. An order of publication was accordingly made. The court, by its decree, vested the title to the lots in Chrisman, annulled the deed of Browning to Dickerson, and decreed that Chrisman should pay to Browning the balance of the purchase money. This decree was affirmed in the supreme court. (See Dickerson v. Chrisman, 28 Mo. 134.)

After the rendition of this decree, Browning presented a petition to the court under the thirtieth article of the practice act of 1849, (Sess. Acts, 1849, p. 103, § 8—11,) praying the court to set aside the decree rendered, grant a rehearing of the cause, and allow said Browning to file an answer therein. This motion was accompanied by an affidavit, in which the allegations of Chrisman's answer, setting up an

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equitable defence to the ejectment suit, were denied. Browning, on motion of Chrisman, was ruled to give security for costs. He was allowed by the court to file an answer in the original cause. Afterwards Chrisman filed a motion setting forth that the suit of Dickerson against himself was an action of ejectment; that he set up an equitable defence thereto, and praying that a decree of title be made in his favor, and that Browning might be made a party; that Browning, upon this application, was made a party; that a decree of title was made in favor of said Chrisman, which was affirmed on appeal to the supreme court; that said Browning was not and is not a necessary party; and praying the court to set aside the judgment or decree as to said Browning, and strike his name out as a party, leaving the judgment in full force against Dickerson. The court sustained this motion, the judgment as to Browning was set aside, "the case left open for Browning to pursue any remedy he may have against Chrisman as though he had never been a party to the original suit of ejectment instituted by Dickerson against Chrisman." The court dismissed the petition of Browning. This constitutes the action complained of. During the pendency of these proceedings a change of venue was taken to Howard county.

*White*, for plaintiff in error.

I. It was not for Chrisman to say that Browning was not a necessary party in the action of Dickerson against him, after he had once decided that he was necessary, and had obtained leave of the court to make him a party, and had dealt with him as a necessary party, having his costs taxed up jointly against him and Dickerson. Browning having been brought into court by order of publication under the practice act of 1849, the last five sections of the thirtieth article of that act point out the means and the only means by which he can relieve himself of the judgment so rendered against him. The course there pointed out he has pursued, and the court below, by dismissing these proceedings, virtually cut him off from all relief from a decree which he in-

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sists was wrongfully rendered against him, and he is left with a decree standing in full force against him, rendered without giving him a hearing, if he is not permitted to be heard in this way. It was necessary that Browning should have been a party, as it will be seen on examination of the decree rendered by the court in the original suit, that Browning was required to convey to Chrisman the same property that he had already conveyed to Dickerson, thereby making himself liable to Dickerson on his warranty the moment the title passed to Chrisman. Chrisman having, by regular course of law, obtained judgment against Dickerson and Browning for the property and for his costs, which judgment was final, he could only, "in furtherance of justice" and on terms "as may be just," amend or change the same. (R. C. 1855, p. 1254.) Nor could any amendment or change be made after the expiration of the term at which said judgment was rendered. (Ashby v. Glasgow, 7 Mo. 320; Bergen v. Bolton & Colt, 10 Mo. 658; Neavans v. Harbert, 25 Mo. 351, 401.) A judgment when obtained against more than one is an entirety, and it was irregular to set the same aside as to Browning and not as to Dickerson. (19 Mo. 441; Randalls v. Wilson, 24 Mo. 76.)

*Adams, Douglass & Hayden*, for defendant in error.

I. Browning was improperly made a party to the suit of Dickerson v. Chrisman. (28 Mo. 134.) He was not a necessary party to a complete determination or settlement of the question in controversy in that case between Dickerson and defendant, nor had he any interest in that controversy adverse to either. His rights, growing out of any transaction between him and the defendant concerning the property in litigation, were not in controversy, and were not passed upon, nor are they in anywise affected by the judgment rendered in that case. His legal rights, therefore, remain unchanged, and he is not barred from asserting them against the defendant whenever it suits his disposition to do so. His petition does not state facts entitling him to have the case re-opened

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and again litigated upon its merits. It shows that he had no interest in the controversy between Dickerson and the defendant, and that he now has none; and that he could not, had the defendant not made him a party to the suit by his answer, have, upon his motion to the court, been made a party plaintiff or defendant. (R. C. 1855, p. 1218, secs. 3 & 4.) The plaintiff in error not being a necessary party to the suit of Dickerson v. the defendant, the motion made to dismiss the suit as to him was properly sustained by the court. The judgment thus rendered by the court upon the motion is against the defendant for costs. It leaves the plaintiff's rights wholly untouched, and puts him in the position that he occupied before he was made a party to the suit. He is out of court, and gets his peace at the expense of the defendant; to any thing more he is not entitled and has no cause to complain.

SCOTT, Judge, delivered the opinion of the court.

We can not see any ground on which the action of the court below can be sustained. It is a great mistake to suppose that a plaintiff can bring in and dismiss parties at his discretion. This power is very much abused under the present practice act. A defendant is brought in by the plaintiff, who, he finds, is a little too hard for him, and who, he sees, may defeat his action, and he will rid himself of the difficulty by dismissing his suit as to such defendant. We had occasion, in the case of *May v. Keithley*, 29 Mo. 220, to remark upon this practice, and point out the evils which may flow from it. No *nolle prosequi* or dismissal of a party ought to be allowed when it will produce any derangement in the rights of the defendants, deprive them of a legal defence, or subject them to increased difficulties or liabilities.

Browning was a proper party to the suit, as his being so would enable the court to do complete justice among the parties. The books say that there may be a decree against one defendant in favor of a co-defendant. If Browning committed a fraud on Dickerson by conveying to him land for a

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valuable consideration, which he knew he was bound to convey to another, then Dickerson might have had a decree against him for the purchase money which he had paid.

Browning's was a warranty deed. Dickerson having failed to recover the lot conveyed by Browning, from that failure a right of action results to him against Browning to recover damages for his breach of warranty. Browning is then affected by the decree. It is true he might have shown in an action on the covenant, had he been no party to the suit, that Dickerson, although he had lost his land as against Chrisman, yet had no cause of action against him. But Browning was brought in by Chrisman himself, and he had a right to make a defence to Chrisman's action. Chrisman has taken a decree against him without notice, but by publication alone. The statute gives Browning a right now to come in and plead to the original action, and there was no power in the court below to deprive him of this right.

The judgment will be reversed and the cause remanded. The other judges concur.

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HENDERSON *et al.*, Appellants, v. DRACE, Respondent.

1. The objections to a writ of attachment issued in aid of a suit, that the caption of the writ and affidavit does not correspond with the title of the suit; that the cause of action set forth in the petition is improperly described in the affidavit and writ, are waived by the filing of a plea in the nature of a plea in abatement.
2. No attachment should be dissolved on account of the insufficiency of the affidavit, if the plaintiff shall file a good and sufficient affidavit in such time and manner as the court may direct. (R. C. 1855, p. 254, § 53.)
3. If the bond filed by the plaintiff in an attachment suit be insufficient, he has a right to file another. (R. C. 1855, p. 242, § 9.)
4. An attachment issued on the 13th of August, the affidavit and bond, which were not dated, were certified by the clerk to have been acknowledged on the 18th of August. *Held*, that, although this was probably a clerical error, yet if the affidavit and bond were not formally filed until five days after the writ of attachment issued, this would not authorize the quashing of the writ.

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*Appeal from Dade Circuit Court.*

This was an action commenced February 26, 1856, in the Johnson circuit court, to recover damages for an alleged wrongful taking and carrying out of the state and conversion of a female slave belonging to the plaintiffs. The cause, as originally commenced, was entitled as follows: "Nancy E. Henderson, Lucinda N. Henderson, Georgia Ann Henderson, minors, by Joseph W. Henderson, curator of the estates of said minors, plaintiffs, v. Peter H. B. Drace, defendant." Defendant appeared and answered. Afterwards on the 13th day of August, 1856, in vacation, a writ of attachment issued in the cause. In this writ of attachment, and also in the affidavit and bond, the cause is entitled as follows: "Lucinda M. Henderson, Georgia Ann Henderson, minors, by Joseph W. Henderson, curator of the estates of said minors, Nancy E. Houx and George Houx, plaintiffs, v. Peter H. B. Drace, defendant." The jurat to the affidavit is as follows: "Subscribed and sworn to this 18th day of August, A. D. 1856. James McCown, clerk." An alias writ of attachment issued August 18, 1856, directed to the sheriff of Jasper county. Under this writ the said sheriff levied upon certain property of the defendant. In the original affidavit the affiant alleges that plaintiffs have a just demand against defendant, after allowing credits, &c., in the sum of \$1,050; that defendant is so indebted for damages, for which an action has been brought, for injuries from the commission of a felony or misdemeanor; and that he has good reason to believe and does believe that defendant is about to remove his property or effects out of the state with the intent to defraud and hinder and delay his creditors. At the May term, 1857, of the Henry circuit court, to which the cause had been taken by change of venue, the defendant Drace appeared and filed his plea in the nature of a plea in abatement, putting in issue the truth of the affidavit, and the cause was continued by consent. Afterwards, at the November term, 1857, of said court, the marriage of Nancy C. Henderson with George W.

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Houx was suggested and said Houx was made a party plaintiff. At the April term, 1860, of the Dade circuit court, to which the cause had been taken by change of venue, the defendant moved the court to quash the attachment for the following reasons: because no sufficient affidavit was filed as required by law before the issue of the writ of attachment; because no bond was filed before the issue of the writ of attachment; because the writ does not show any circumstances which authorized its issue by the clerk in vacation; because the cause of action set forth in the petition is not for damages occasioned by injuries arising from the commission of a felony or misdemeanor. This motion the court sustained, and released the property attached.

*Johnson & Ballou*, for appellants.

I. The circuit court erred in not permitting plaintiffs to amend the writs of attachment, if they were invalid upon the ground alleged in the defendant's motion to quash, "that it does not appear that said attachments were issued in aid of the original suit." (17 Mo. 405.) The law was complied with. The writs were entitled in the cause so far as it could be done in the case. Nancy C. Henderson, the wife of George W. Houx, had been married to him since the last continuance, and it was proper he should have been introduced in the proceedings as a party, or it might have been error. The affidavit for the attachment shows that it was in aid of the original suit. The original petition was attached to the writs. There is no pretence that there was any other petition filed. (R. C. 1855, p. 242.) The court should have allowed the writs to be amended. (R. C. 1855, p. 257, § 64, p. 1253; 19 Mo. 141.) The affidavit is sufficient. (R. C. 1855, p. 123.) The objection that there was no bond filed before the issue of the writs of attachment is no ground for quashing the writs, and if it was upon this ground that the writs were quashed, it is manifest error, as plaintiff offered to give a good bond, and in fact offered one before defendant's motion to quash was sustained. The bond filed was suffi-

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cient. (7 Mo. 458; 16 Mo. 258; 2 Scam. 473; 1 Scam. 551; 9 Mo. 397.) The filing of the bond with the clerk is *prima facie* evidence that he has approved it. (7 Blackf. 558, 536.) The question in this case is not whether this is a bond or not, but whether it shall be considered a sufficient paper or instrument of writing to allow the plaintiff to file another upon the ground that it is not sufficient.

*Edwards & Ewing*, for respondent.

I. The court did right in sustaining defendant's motion to quash the writ of attachment. The bond was void. The law requires the affidavit and bond to be filed in *all cases* before the writ issues, in original as well as attachments in aid. (R. C. 1855, p. 241, § 5, 8, 13.) On the 13th of August, 1856, the writ was sued out, and on the 18th of the same month, five days thereafter, the affidavit and bond were filed. This of itself would be sufficient to quash the writ. If the writ can be issued five days before the bond and affidavit are filed, what obligation is there on a plaintiff to file a bond at all until forced by motion of the adverse party and an order of the court. Even then he is not bound to file it; and if he is insolvent and can not give a good bond, and in the mean time the defendant should be largely damaged, what remedy has he? Merely because the plaintiff in this case proposed to give a good bond is no excuse for the failure to do so in the first instance. If property can be attached and parties perhaps subject to heavy damage in one case, they can in another; and to have permitted the plaintiffs to file a new bond, or to sue out the writ before the bond was filed, would be putting the rights of every one in jeopardy. The law was made for a purpose. (5 Mo. 18.) The bond was a nullity. (Drake on Attachments, § 115, 116, 121, 123.) The writ was irregular upon its face. (R. C. 1855, p. 243, § 16.) The cause of action is not for damages occasioned by injuries arising from the commission of a felony or misdemeanor. (3 Ark. 501; 2 Cal. 251; 6 Ark. 468; 2 Nott & McCord, 125; 1 Hill, 171.)

NAPTON, Judge, delivered the opinion of the court.

This suit originated in Johnson county, and was removed from that county to Henry, and thence to Dade county, where it was ultimately disposed of. The writ issued in February, 1856, and the petition is for damages occasioned by the defendant's taking and carrying off a slave alleged to belong to the plaintiffs.

On the 13th of August, 1856, an attachment was issued by the clerk of the circuit court of Johnson county in vacation, upon an affidavit of Joseph W. Henderson, curator of the minor plaintiffs, and the filing of a written contract purporting to be a statutory bond. This attachment was levied on property in Dade county.

Before the suit had been removed from Johnson county, a change occurred in the name of one of the parties plaintiffs, Nancy E. Henderson, by reason of her marriage with George Houx, which was brought to the attention of the court at the term subsequent to the date of the attachment, and the necessary change in the title of the case was formally entered on the record. Whilst the suit was pending in Henry, the defendant put in a plea in abatement, denying that the plaintiffs had good reason to believe that he was about to remove his property.

In the circuit court of Dade county, where the case finally went, a motion to quash the attachment was made, which was sustained, and an order made that the property attached should be restored to the persons from whom it had been taken by virtue of the attachment. The propriety of this judgment is the only question presented by the record.

The grounds upon which the defendant relied for quashing the writ of attachment are, that it is not properly entitled in the cause; that there is no sufficient affidavit or bond; and that the cause of action specified in the writ and affidavit and bond is not the one stated in the petition. When the motion was made, the plaintiffs offered to amend the writ and

affidavit and to file a new bond, but the amendment was not allowed, nor was the bond permitted to be filed.

There seems to be a clerical error in the date of the acknowledgment of the affidavit. The attachment issued on the 13th of August, and the affidavit and bond, though not dated, are certified by the clerk to have been acknowledged on the 18th of August, five days after the attachment issued. As the writ was returned by the sheriff on the 18th, it is quite probable that this discrepancy in the figures is merely apparent, and, if real, is at most a clerical error. It is not likely that the clerk would issue the writ before the affidavit was made and the bond given; but if this was so, and an interval of five days did occur between the date of the writ and the formal filing of these papers, it is hard to see how the error is remedied by quashing the writ.

Another objection taken was that the caption of the attachment and affidavit do not correspond with the title of the suit. It seems that after the commencement of the suit and before the attachment was sued out, one of the female plaintiffs intermarried with George Houx, and the clerk, taking notice of the change of name which this change of condition produced, made a corresponding change in the title of the cause. It is not pretended that any one was misled or could have been misled by this, and as the defendant, after all this occurred, came in and filed his plea in abatement, there was an appearance to the suit under the title which the clerk gave it in anticipation of the action of the court.

It was further objected that the affidavit and writ describe the cause of action improperly. The affidavit uses the very words of the statute. The affiant makes oath that the plaintiffs have a just demand against the defendant, and specifies the amount to which he believes the plaintiffs are entitled and alleges the existence of one of the causes allowed by the statute for suing out the writ. In addition to this, the affidavit proceeds to describe the nature of the damage which it is said the petition complained of, and calls the action one for injuries arising from the commission of a felony or mis-

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demeanor. This is superfluous, and might well have been so considered. The petition explained itself sufficiently. No harm, however, could result to the defendant from an incorrect statement of its contents in the affidavit or writ of attachment, and the plea in abatement may be regarded as a waiver of the exceptions. Besides, the plaintiffs offered to amend, and this is now expressly allowed by the statute. (R. C. 1855, p. 254, § 53.)

The objection to the bond is, that the words "under seal" are omitted in the body of the instrument, although scrawls are appended to the names of the persons signing it. Our statute provides for a new bond or a sufficient bond whenever objections are discovered to the one first taken. When the plaintiffs offer a good bond, it is singular that the dismissal of the suit for the want of one should be insisted on. If security is the object, and the defendant is really desirous of trying the case on its merits, the bond offered answers the purpose. It is strange that a party should complain of being harassed without adequate indemnity against damage, when the opposing party comes forward and offers to give all the security required. To persist in a motion to annul the whole proceedings under such circumstances, would seem to show that the object is not security, but a release of the property attached, and a consequent discharge from all responsibility on his part. The effect of such a course must of course be to leave the party complaining without security, when the want of it is the only thing complained of.

The judgment is reversed and the cause remanded ; Judge Ewing concurring. Judge Scott absent.



THE STATE, Respondent, v. WILLIAMS, Appellant.

1. Perjury is, by statute, a felony. An indictment for perjury must charge that the act of false swearing was done feloniously.
2. It is the province of the court, and not of the jury, to determine whether the fact sworn to was material in the judicial proceeding in which the perjury is alleged to have been committed.

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3. In trials for perjury it is improper to instruct the jury that the law presumes the declarations of a party against himself to be true, when the object of such an instruction is to make the declarations evidence of the falsity of the oath. The weight of such declarations is to be determined by the jury. Of themselves they are not sufficient to convict one of perjury.

*Appeal from Miller Circuit Court.*

The defendant Williams was indicted at the October term, 1859, of the Miller circuit court for perjury alleged to have been committed by him in delivering his testimony before the grand jury at the October term, 1858, of said court, touching a charge of forgery preferred against one Charles H. Ingram, then undergoing investigation. The matter upon which the perjury was assigned was that Williams falsely and corruptly swore that Charles H. Ingram had falsely counterfeited and forged a promissory note, purporting to have been executed by J. Y. Williams & Co.; that said Ingram was not at the time of signing of said note, and never was, a copartner of his; and that he had no authority to sign the name of J. Y. Williams to the note. The act of false swearing charged was not alleged to have been done feloniously. The indictment concludes by charging that the defendant did falsely, feloniously, &c., commit wilful and corrupt perjury.

The court, on motion of the circuit attorney, gave the following instructions among others: "1. If the jury believe from the evidence that the defendant appeared and was duly sworn as a witness before the grand jury of Miller county, at the October term, 1858, of the circuit court within and for said county, and that the said defendant gave testimony before said grand jury upon a charge of forgery then pending before said grand jury against one Charles H. Ingram in regard to the execution by said Ingram of the note read in evidence; and that the said defendant did before said grand jury depose and swear, among other things, in substance and to the effect charged in said indictment, and that said statements and facts, or the substance and effect of any one of said statements and facts, being material to the determina-

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tion of the issue then pending before said grand jury upon said charge of forgery, was wilfully, knowingly and corruptly false, the jury must find the defendant guilty, and in that case may assess his punishment by imprisonment in the penitentiary for a period of years not less than two nor more than seven. 4. In considering the declarations and admissions of defendant, the jury must consider them altogether. He is entitled to the benefit of what he said for himself, if true; as the State is of any thing he said against himself, in any conversation proved by the State. What he said against himself the law presumes to be true, because against himself; but what he said for himself the jury are not bound to believe because said in a conversation proved by the State; they may believe or disbelieve it, as it is shown to be true or false by the evidence in the case."

The defendant was found guilty.

*Parsons*, for appellant.

I. It was the province of the court, and not of the jury, to determine the materiality of the alleged false matter sworn to. The court should have declared to the jury what part of the alleged false oath was material to the questions pending before the grand jury. The first instruction for the State was erroneous. There was no evidence to warrant the second and third instructions. The fourth instruction was erroneous. The declarations of the defendant, in cases of perjury, contrary to what has been charged to be false in the indictment, are not presumed to be true. Had they been made under oath, they would not have been taken as true against the alleged false oath, for the purpose of establishing its falsity, without other evidence to show the falsity of the statements alleged in the indictment and the truth of the declarations. (Whar. Am. C. L. 570.) It is a matter for the jury exclusively whether the whole or any part of the declarations of the defendant ought to be credited. (State v. Martin, 28 Mo. 530.) The instructions refused should have been given.

II. The motion in arrest should have been sustained. The indictment does not charge that the defendant did *feloniously* swear, depose, &c.

*Knott*, (attorney general,) for the State.

I. The instructions given on motion of the circuit attorney contained a correct exposition of the law; the court committed no error in giving them. The fourth instruction contains substantially the doctrine held in the case of *The State v. Green*, 13 Mo. 382. It is simply that the jury, while they believe what a party may say against himself, from the strong presumption that a sane man would not make an admission against himself unless it were true, may disbelieve what he says in his own favor because the same reason does not exist for believing it true. (*Rosc. Cr. Ev.* 37, 55.) This is an exact copy of the instruction in the case of *The State v. Hays*, 23 Mo. 319.) The court properly refused the instructions asked for defendant. The indictment is sufficient. The word "feloniously" is inserted so as to give color to the offence. There is no defect that can prejudice the defendant.

SCOTT, Judge, delivered the opinion of the court.

Perjury by our laws is made a felony, though not one at common law. The indictment in this case does not charge that the act of false swearing was done feloniously. It is well settled that in all indictments for a felony the act must be charged to have been done feloniously. The omission of that word in this indictment renders the judgment fatally defective.

The court, and not the jury, must determine whether the fact sworn to was material in the judicial proceeding in which the perjury is alleged to have been committed. The instruction therefore which submitted this question to the jury was erroneous.

In trials for perjury it is not proper to instruct the jury that the law presumes the declarations of a party against

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himself to be true, when the object of such an instruction is to make the declarations evidence of the falsity of the oath. Such declarations are admissible, and their weight is to be determined by the jury. But of themselves they are not sufficient to convict one of the crime of perjury. Even when the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false. (Whar. Cr. Law, 761.) If the declarations of the party are presumed to be true, then the burden of proving the defendant's guilt is removed from the State, and he is required to prove his innocence.

Judgment reversed. The other judges concur.

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THE STATE, Plaintiff in Error, v. TERRY, Defendant in Error.

1. In an indictment for perjury, the false swearing must be charged to have been done feloniously.
2. Grand jurors may indict on their own information or knowledge; they may indict a person for perjury in testifying before themselves.
3. A person may commit perjury by falsely swearing, before a grand jury, that he did not know of any person who had, within twelve months, bet any money or property upon any game of cards in the county.

*Error to Cole Circuit Court.*

The defendant Terry was indicted for perjury charged to have been committed before the grand jury then sitting. The indictment recited the names of the grand jurors; that they were regularly empannelled and sworn and charged, &c.; that Robert V. Glover was appointed foreman, and as such was legally authorized to administer oaths to witnesses; that defendant was subpoenaed, appeared and was duly sworn by said foreman as a witness; that it became and was a material question whether any person within the twelve months then last past, in the county of Cole, had bet any money or property upon any gaming table, bank, cards, or other device

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prohibited by law ; " that said Henry Terry, being so sworn as aforesaid, contriving and intending to prevent the due course of justice, did then and there knowingly, falsely, wilfully and corruptly, state, depose, and swear before said grand jury, (so sworn as aforesaid to inquire as aforesaid,) amongst other things, in substance and to the effect following, that is to say, that he, the said Henry, did not know of any person who had bet any money or property upon any game of cards within Cole county, and within the twelve months then last passed ; and that he, the said Henry Terry, had seen no person or persons within the twelve months then last past, and in Cole county, bet any money or property at or upon any game played at or by means of cards or any other gaming device ; and that he, the said Henry Terry, had no knowledge whatever that the law prohibiting gaming and playing at cards for money or property had been violated by any person at all," &c. The indictment then proceeds to charge acts of gaming of which the defendant had knowledge, and closes by charging that Terry wilfully and corruptly did commit wilful and corrupt perjury.

This indictment was quashed on motion of defendant.

*Knott*, (attorney general,) for the State.

I. Grand juries may institute prosecutions on their own motion. The action of grand juries is not limited in this state to cases where the accused has been recognized or committed, nor is it essential to the validity of an indictment that the grand jury should make a formal presentment of the matter in court before finding the bill. There are hundreds of violations of the criminal code that, for want of a prosecutor to bring them to notice, would be indulged in with perfect impunity, had not the grand jury the power, and indeed were they not bound by their oath, to inquire into them and institute proceedings for them on their own motion. (See *State v. Wolcott*, 21 Conn. 272 ; *State v. Ward*, 2 Mo. 98, 120 ; 12 Mo. 406 ; R. C. 1855, p. 1172 ; 1 Opinions of Att'y Gen'ls, 22.) They may find indictments for offences

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committed in their immediate presence. Suppose a witness under examination before the grand jury should murder the circuit attorney in their presence; where would be the impropriety of waiting for the empannelling of another grand jury before an indictment can be found? It is not necessary that there should be a formal presentment before the finding of the bill. The almost universal practice of this State is against such formal presentment.

II. The grand jury had a right to ask the general question, whether defendant had seen any person bet any money, &c. He was bound to answer it. (State v. Ward, 2 Mo. 120.) It was a material question.

III. The word "feloniously" is left out of the indictment. This will invalidate it, under former decisions. As that point was not raised in the court below, the court is respectfully asked to pass upon and settle the points raised in the motion to quash.

*Gardenhire*, for defendant in error.

I. A prosecutor, or complainant, or witness on the part of the prosecution, is not a competent grand juror, and either is good ground of challenge to the array. (R. C. 1855, p. 1167, § 2, 3.) The same grand jury before whom a perjury has been committed can not find an indictment for it, without doing it on their own testimony. It is a secret tribunal, and no one but themselves is permitted to hear the testimony; and they are not allowed to disclose it, except when lawfully to testify as a witness in relation thereto. A witness certainly would not be a competent juror on the final trial, and the reason rendering him incompetent applies with equal force to the grand jury. The whole spirit of the criminal law is against indicting or trying a party by juries thus constituted.

II. The matter sworn to is not sufficient to support an assignment of perjury. The witness ought to have been questioned as to the violation of law by some particular person, otherwise the inquiry included every man in the county,

the grand jury included. Under the law, was it a material question whether every man in the county was innocent of playing cards, or some one of them guilty? For the defendant, it is insisted that there could be no such material question; that the defendant could not be compelled to answer; that if wrongfully compelled, perjury could not be assigned upon his answer; and that having answered voluntarily, there can be no better foundation for an assignment of perjury than if forced.

III. Perjury is a felony, and the indictment does not charge that the defendant *feloniously* swore falsely. The judgment must therefore be affirmed.

SCOTT, Judge, delivered the opinion of the court.

This was an indictment for perjury. The false swearing was not alleged to have been done *feloniously*. In all indictments for a felony, it is necessary to charge the criminal act to have been done *feloniously*. Perjury is a felony by our laws, though not so at common law. The indictment was properly quashed.

It was urged by the defendant that, as a prosecutor, or complainant, or witness on the part of the State, could not be a competent grand juror, (R. C. 1855, p. 1167, § 2 & 3,) that the grand jury before which a perjury is committed by a witness could not indict such witness for the crime. In answer to this objection, we may cite the twenty-second section of the third article of the act concerning practice in criminal cases, (R. C. 1855, p. 1170,) which provides that no indictment for any trespass against the person or property of another, not amounting to felony, &c., shall be preferred unless the name of a prosecutor is endorsed as such thereon, except when the same is preferred upon the information or knowledge of two or more of the grand jury. This is sufficient to show that, under our code, grand jurors may indict on their own information.

It was further urged that the question put to the witness was so general that no assignment of perjury could be made

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on an answer to it. The question in substance was, whether the witness knew that any person within the last year in Cole county had violated the laws against gaming by betting upon any gaming table, bank, cards, or other device prohibited by law. It was decided in the case of *The State v. Ward*, 2 Mo. 120, that such a question might be asked a witness by the grand jury.

Affirmed. The other judges concur.



BURTON, Defendant in Error, v. NORTH MISSOURI RAILROAD,  
Plaintiff in Error.

1. If horses or animals are killed or injured by the cars, locomotives or other carriages used on a railroad, and the accident does not occur at a crossing of a highway or on a portion of the road enclosed by a fence, the railroad company will be liable for such injury, under the fifth section of the act approved December 12, 1855, (R. C. 1855, p. 649,) irrespective of any question of negligence, unskilfulness or misconduct on the part of the officers, servants, or agents of such company.
2. This liability extends to railroad companies, whether the fifty-second section of the general railroad act (R. C. 1855, p. 437) applies to such road or not.

*Error to Macon Circuit Court.*

The plaintiff seeks in this action to recover damages for the loss of two horses caused by their being run over by the cars of the defendant, the North Missouri Railroad Company. The plaintiff alleges in his petition that the accident occurred at a place where the road was not enclosed by a lawful fence; that it did not occur at a crossing of a public highway. The evidence adduced showed that at the place where the accident occurred the road was not enclosed by a fence. It was near a crossing of a state road, about seventy or eighty feet beyond it. The court refused declarations of law asked by the defendant, basing the liability of the latter on the issue of negligence.

The court found for plaintiff.

*Carr*, for plaintiff in error.

I. The court erred in overruling the demurrer to the amended petition. The petition is designed to be drawn in such a manner as to comprehend parts of two different statutes. (R. C. 1855, p. —, ch. 39, § 52; id. ch. 51, § 5.) It fails in comprehending either. It should follow the language of the statute and conclude against the form of the statute. (8 Mo. 350; 17 Mo. 375.) It is not averred that the horses were crippled through the negligence, unskillfulness or misconduct of the officers, &c., of the company. It is not shown that where the crippling was done was in a part of the road passing through enclosed fields, so as to bring it within the purview of the fifty-second section of the general railroad act. It is not a petition for trespass at common law. (See 29 Mo. 167; 28 Mo. 30, 335.) The said fifty-second section is only applicable to companies formed under said act, not to the defendant.

II. The court erred in refusing the declarations of law asked on behalf of defendant. They were applicable to the facts in evidence. The fifth section merely shifts the burden of proving negligence. The railroad company may show that there was no negligence, unskillfulness, or misconduct. The company could not fence at this crossing of the state road, and thus keep out stock. (6 Indiana, 141; 8 id. 402.) The court erred in finding a general verdict. The issues should have been specially found. (Ewing v. Seaton, 17 Mo. 465; 6 Mo. 50; 9 Mo. 624.) There was no evidence of the amount of damages sustained.

*Ryland and Prewitt*, for defendant in error.

I. The declaration is sufficient. It would have been sufficient to charge that defendant injured plaintiff's horses by running over them with the cars and giving the value of the horses and the injury. That would be a good declaration in case of trespass under our old practice. The statute only changes the proof necessary for plaintiff to recover, with a proviso that the section shall not apply to certain cases. (R.

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C. 1855, p. 49, § 5.) Now the petition goes on and negatives these exceptions, which was more particular than was necessary, except in indictments charging crimes created by a statute, where the books say that if it is in the same section it must be negatived, but if in another following that one, the defendant must plead the exception.

II. The instructions asked by defendant were all given as appears by the mark on the margin of each one, at least all that are in the record were given and are so marked on the margin. It devolves on the plaintiff in error to show beyond equivocation, that the matters assigned by him as error, and of which he complains, were ruled against him in the lower court. All the instructions asked ought to have been refused. Not one contains all the qualifications of care and diligence required by the law to discharge defendant. (*Gorman v. Pacific Railroad Co.*, 26 Mo. 441; R. C. 1855, p. 649, § 5.) The statute is repealed requiring a judge to find a special verdict.

NAPTON, Judge, delivered the opinion of the court.

The fifth section of the statute concerning damages in the revised code of 1855 provides that "when any animal or animals shall be killed or injured by the cars, locomotive, or other carriages used on any railroad in this state, the owner of such animal or animals may recover the value thereof in an action against the company or corporation running such railroad, without any proof of negligence, unskilfulness or misconduct on the part of the officers, servants or agents of the company; but this section shall not apply to any accident occurring on any portion of such road that may be enclosed by a lawful fence, or in the crossing of any public highway." (R. C. 1855, p. 649.)

The fifty-second section of the general railroad law declares "that every corporation formed under this act shall erect and maintain fences on the side of their road where the same passes through enclosed fields, of the height and strength of a division fence required by law, with openings

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or gates or bars therein and farm crossings of the road, for the use of proprietors of lands adjoining such railroad; and also construct and maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on to said railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, &c., thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for such damages unless negligently or wilfully done." (R. C. 1855, p. 437.)

By the fifth section above referred to, the railroad company is made responsible for injuries to horses or cattle, without regard to the question of diligence or negligence, unless the injury occurs in enclosed fields or at a road-crossing. The fifty-second section of the general railroad law makes the same provision in relation to all corporations affected by that law, and also furnishes an explanation of the object of the legislature. The railroad companies are required to fence up their roads, where they pass through enclosed fields, and to construct cattle-guards where they cross the public highway. When this is done they are not responsible for accidents; there must be negligence or misconduct on the part of their agents to make them responsible for injuries to cattle or other animals.

This suit is brought under the fifth section of the act concerning damages. The injury is described and it is averred that it occurred on a portion of the road not enclosed, and that it did not happen at a road-crossing. This, in our opinion, was sufficient. It was not necessary to aver negligence.

It is not material whether the fifty-second section of the general railroad law applies to the North Missouri Railroad Company or not. The inquiry presented in this case is not whether the company was bound to construct cattle-guards and put up fences, but whether in fact the injury happened where such cattle-guards and fences had been made. The company may be at liberty to omit these precautions against

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accidents, if they prefer to take the risk rather than encounter the expense. The statute is positive that they must pay all damages when they fail to use these precautions, without any question as to whose fault may have led to the accident. If they enclose their road with fences or cattle-guards, so as to prevent stock from getting on the road, the law does not hold them responsible, except in cases of negligence or wanton injuries.

It will be seen that the instructions asked in this case had no application whatever to the case charged or proved, and were therefore properly refused.

Judgment affirmed. The other judges concur.

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THE STATE, Respondent, v. PEMBERTON, Appellant.

1. An indictment is rendered bad by reason of the omission of the words :  
 { "against the peace and dignity of the state." }
2. The concluding clause of the twenty-seventh section of the fourth article of the act regulating proceedings in criminal cases, (R. C. 1855, p. 1176, § 27,) providing that no indictment shall be deemed invalid, nor the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits," should, at least, be limited in its application to imperfections of the class previously enumerated in said section.
3. An indictment for murder, after charging an assault by the accused upon one H. D. and the felonious infliction of a mortal wound upon the latter by stabbing with a knife, whereof the said H. D. died, concluded as follows :  
 "And so the jurors aforesaid, upon their oaths aforesaid, do say that the said C. H. P., in manner and form and by the means aforesaid, feloniously, wilfully, maliciously, deliberately, premeditatedly, on purpose, and of his malice aforethought, did kill and murder; contrary to the form of the statute, and against the peace and dignity of the state. *Held*, that the indictment was bad, inasmuch as it did not designate the person murdered.

*Appeal from Benton Circuit Court.*

This was an indictment against Charles H. Pemberton for murder. The first count did not conclude "against the form of the statute, and the peace and dignity of the state." The

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second count of the indictment, after charging a felonious, premeditated and malicious assault by Charles H. Pemberton upon one Hezekiah Depew, and a felonious, premeditated and malicious wounding of the latter, mortally, by stabbing with a knife, whereof said Depew died, proceeded as follows: "And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Charles H. Pemberton, in manner and form and by the means aforesaid, feloniously, wilfully, maliciously, deliberately, premeditatedly, on purpose, and of his malice aforethought, did kill and murder; contrary to the form of the statute, and against the peace and dignity of the state."

Upon this indictment the defendant was found guilty of murder in the first degree. It is deemed unnecessary to set forth the evidence, or the instructions given or refused.

*Johnson & Ballou*, for appellant.

I. The indictment is wholly insufficient. The first count does not conclude "against the peace and dignity of the state." (State v. Lopez, 19 Mo. 254; Const. of Mo. art. 5, § 19.) The second count is bad. It does not allege whom the defendant killed and murdered in the conclusion. (Dias v. State, 7 Black. 20.) Defendant could not be lawfully convicted on it of murder. (Whart. C. L. 490; 3 Chitty, C. L. 750, 759, 766; Whar. on Hom. 276; 1 Arch. C. P. 92; State v. Lester, 9 Mo. 666.) The court erred in giving and refusing instructions. The verdict is unwarranted by the testimony.

*Knott*, (attorney general,) for the State.

I. The second count is sufficient to sustain the judgment of conviction. It may be true that it would not have been a good indictment at common law. (Dias v. State, 7 Blackf. 20.) The defect—omission of the name of the deceased—did not tend to the prejudice of the substantial rights of the defendant upon the merits. It should not authorize an arrest of judgment. (R. C. 1855, p. 1177, § 27.) The court did not err in giving or refusing instructions. (18 Mo. 419,

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435; State v. Neuslien, 25 Mo. 111; 20 Mo. 58; 8 Humph. 671; 1 Ired. 354; 3 Ired. 424; 1 Ashm. 289; 9 Mo. 271; 16 Mo. 391; 19 Mo. 241; 2 Rob. 790; 2 Grat. 594; 3 id. 595; 6 id. 728; 12 Gratt. 729; 3 Humph. 304; 5 Yerg. 151; 4 Pike, 88; 2 English, 174.)

NAPTON, Judge, delivered the opinion of the court.

The first count in this indictment is bad, under the decision of this court, by reason of the omission of the words "against the peace and dignity of the state." (State v. Lopez, 19 Mo. 254.)

The second count is conceded by the attorney general to be bad at the common law, in consequence of the omission of the technical word "murder," or rather the omission of the name of the deceased, in the allegation that "so the jurors aforesaid do say that the said Charles H. Pemberton, in manner and form aforesaid, feloniously, wilfully, maliciously, deliberately, premeditatedly, on purpose, and of his malice aforesaid, did kill and murder." This is equivalent to an entire omission of the allegation; and the authorities are uniform that such an indictment is bad. (Dean v. The State, 7 Black. 20, and cases there cited.)

It is contended, however, that our statute, which provides that a judgment in a criminal case shall not be arrested or affected for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant, upon the merits, has changed the law in this respect. (2 R. C. 1855, p. 1177.)

The section of the statute in which this provision occurs commences by enumerating a great number of trivial defects, such as the omission of defendant's title, the words "with force and arms," the time when the offence was committed, a proper venue, &c., and then concludes with the general clause above referred to, which cures all other defects or imperfections not tending to the defendant's prejudice.

Whether the general clause is to be interpreted as extending the operation of the specific provisions which precede it,

is not necessary to be decided here. We think, upon every safe rule of construction, that it should at all events be limited to imperfections of the class or character previously enumerated. To give it a more extensive meaning would be to render all the specifications in the same section useless.

It is obvious that the charge of murder by the technical term or word of art does not belong to the class of technicalities to which belong all the enumerated formal allegations whose omission is cured. The omission of the word "feloniously" in an indictment for felony has always been held fatal by this court, as well since as before the passage of this act; but the word "feloniously" is a mere term of art, as much so as the word "murder," and its omission has no more tendency to prejudice the accused than the omission of the word "murder."

If the design of our legislature had been to change the entire system of criminal pleading, they undoubtedly would have supplied a substitute for the one abolished. They have done so in civil proceedings, but in criminal proceedings changes, when made, have been specific. The ancient forms of proceeding have been retained, with specific modifications; and it is only from the clause we are now called upon to construe that any inference can be drawn of a design on the part of the legislature to abolish the entire system of criminal pleading. To give so liberal and latitudinous a construction to this clause, would undoubtedly destroy many if not all of the forms which have been hitherto observed. It would be, in truth, to put civil and criminal proceedings on the same footing, and allow the prosecution to make, as in civil proceedings, "a plain and concise statement of the fact" constituting the offence, without regard to mere technical phrases and forms.

This court does not feel warranted in giving such a construction to an isolated clause of a statute, the general tenor of which is sufficient to show that no such sweeping and radical charges were designed.

In accordance, then, with all the precedents, we think this

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indictment bad, and there must, therefore, be a new trial granted.

The instructions given by the court have been examined, and are believed to be substantially correct.

As there must be a new trial, we refrain from any comment on the evidence.

Judgment reversed and cause remanded; Judge Ewing concurs. Judge Scott absent.



SMITH, TRUSTEE, Respondent, v. HUTCHINGS, Appellant.

1. The fourth section of the act concerning fraudulent conveyances, (R. C. 1845, p. 526; R. C. 1855, p. 803,) making conveyances of chattels void as to creditors and purchasers unless accompanied by possession in the grantee or unless duly recorded, as there directed, has no extra territorial operation; it does not apply to deeds made in another state, where all the parties to them and the property conveyed by them are located at the date of their execution. If the deed is valid by the law of the place where made, it is valid in this state.
2. Whether leading questions may be put to witnesses testifying in a cause is discretionary with the court; so also whether the answers to leading questions in depositions shall be received.

*Appeal from Ray Circuit Court.*

In the year 1846, John S. Bright, then living in Mercer county, Kentucky, executed a deed conveying, together with other property, a slave named Fanny to Harold F. Smith, also a resident of Kentucky, in trust for the wife and children of the said Bright. The said slave was to be held by said trustee for the use and benefit of the said wife and children, the trustee being directed to dispose of, sell and control said slave and other property according to the written directions of the wife, she never taking absolutely more than a child's part. This deed was recorded in Mercer county, Kentucky, on the day of its date. After the execution of said deed the said slave Fanny gave birth, in Kentucky, to a boy named Ben, the slave in controversy. In 1850, the said

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Bright with his family moved to and settled in Ray county, Missouri, bringing said slave Fanny and the boy Ben along with him. On the 15th of August, 1854, Bright and his wife Louisa J. Bright, joined in a bill of sale under seal of said boy Ben to Hovey Hutchings. The deed of trust, made in 1846 to Smith as trustee, was not recorded in Ray county until December 13, 1854. From the date of said deed of trust to the date of said bill of sale to Hutchings, Bright was in possession, in Kentucky and Missouri, of said slave Fanny, and of the boy Ben after his birth. Said Bright has since died.

This action is brought by the said Smith, as trustee for the widow and children of said Bright, against the said Hutchings, to recover possession of said boy Ben.

At the trial the defendant objected to the reading of the answers to certain leading questions contained in depositions read by plaintiff. The court permitted the questions and answers to be read.

The court refused all the instructions asked by both plaintiff and defendant, and of its own motion gave the following: "1. The deed of trust read in evidence vested in Harold F. Smith, as trustee for Mrs. Louisa J. Bright, wife of John S. Bright, and their child, the title to the negro slave Fanny mentioned in said deed of trust; and the other children of the said John S. Bright and Louisa J. Bright, born after the execution of the said deed of trust, became beneficially interested with their mother and the first mentioned child, as they were severally born, in the said slave Fanny. 2. If the said deed of trust was executed in the county of Mercer, in the state of Kentucky, and was recorded in the office of the recorder of said county in Kentucky, while the said beneficiaries resided in said county, and while the trust property was in said county and state, the subsequent removal of Bright and his family with the trust property to the county of Ray, in the state of Missouri, and the failure to have the said deed of trust recorded in the office of the recorder of the county of Ray, in the state of Missouri, would not affect

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the title acquired by the deed of trust. 3. If the jury find that the negro slave Ben sued for was the child of the said slave Fanny and that he was born while Fanny was so held in trust, then the title to Ben vested in the trustee for the persons beneficially interested under said deed of trust. 4. According to the provisions of the deed of trust, Louisa J. Bright, wife of John S. Bright, had an interest equal to a child's part in the trust property, and she had the right under said deed of trust to dispose of her said interest, but she could not by any act of hers, without the intervention of the trustee, affect the interests of her children. 5. The bill of sale read in evidence executed by John S. Bright and Louisa J. Bright his wife, bars the title to one undivided fifth part of the slave Ben owned by Louisa J. Bright, and leaves the interests of the other parties as they stood before the execution of the said bill of sale. 6. If the jury find for the plaintiff, they will find four-fifths of the value of the said slave Ben at the commencement of the suit, with interest at six per cent. per annum to this time, to be recovered by the trustee for the use of the children of John S. Bright and Louisa J. Bright."

*Ryland & Son*, for appellant.

I. The court erred in refusing to suppress the leading questions and the answers thereto in the depositions read in evidence. The questions were clearly leading. (1 Greenl. Ev. § 424; 1 Stark. 150; 1 Phill. Ev. 268; 4 Wend. 229.) The cases of *Glasgow v. Ridgley*, 11 Mo. 34, and *Walsh v. Agnew*, 12 Mo. 530, no longer afford any rule of action on this subject. (R. C. 1855, p. 659, § 30.) The court ought to have given the instructions asked in behalf of defendant. The sale of the negro by Bright was sanctioned by Mrs. Bright, the *cestui que trust*. Plaintiff did not file the deed of trust for record in Ray county until more than four years after the negro was brought to this state. The sale ought to be effectual to pass the title to defendant. This deed of trust should have been recorded in the county in which the

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property was placed. This not having been done, and the possessor having sold the property to an innocent purchaser, the title passed. The instructions given were erroneous.

NAPTON, Judge, delivered the opinion of the court.

We are not called upon in this case to express any opinion in relation to so much of the instruction given by the circuit court upon the trial as relates to the title of Mrs. Bright. The instruction declared that Mrs. Bright parted with her interest in the slave sued for by joining in the bill of sale, and as the judgment is acquiesced in by the party representing her interest, the propriety of the direction is not a matter for our consideration.

But it is insisted by the party complaining that the instruction should have further declared that the sale by the husband passed the title of the children, or that their title was lost by the failure of the trustee to record the deed in Ray county.

This subject has been so often before this court that it is not necessary to go into any detailed examination of it here. The fourth section of the act concerning fraudulent conveyances was not designed to have any extra territorial operation. It does not apply to deeds made in Kentucky or Virginia, where all the parties to them, and the property conveyed by them, are located at the date of their execution. When the title passes by the law of the country where the deed is made, and where the property is and the parties reside, it is good everywhere else, upon every principle of international comity, unless the policy of the state, to which the property is brought and where the controversy arises, should induce a different rule. Our legislature has not thought proper to change or modify this general principle; and although experience may show that many frauds are committed for want of such enactments, it may be doubted whether the protection furnished to purchasers by such a law would not be more than counterbalanced by the gross injustice done to defenceless women and children. The rule of

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*caveat emptor* is the well established and generally known principle of the common law, yet it occasionally works injustice in other cases besides the class we are now speaking of. When a man is willing to defraud his wife and children by undertaking to sell property which he knows is theirs and to which he is conscious he has no title, there must be recklessness, improvidence, or want of honesty, or all combined; and this character will usually show itself in other acts, so that the purchaser who deals with such a person ought to be on his guard. If the vendor is a stranger to the vendee, there is the greater necessity of watchfulness on the part of the buyer. The exercise of ordinary diligence will usually lead to some suspicions of the truth. Here, the defendant, purchasing a negro boy from Bright, in whom he alleges was the sole title, requires the wife to join in the bill of sale. This circumstance shows that the wife was believed to have an interest, and that was sufficient to put the purchaser upon inquiry.

In relation to the leading questions found in the depositions, we do not consider that the court was bound to suppress the answers, for this reason alone. The form in which questions to witnesses are put must be regulated by the court which tries the case, and whether the answers shall be received when in the form of depositions is a matter of discretion. It is not a matter upon which error can be assigned. We do not understand the thirtieth section of the act concerning depositions in the revised code of 1855, (p. 659,) as intended to change this practice, and overturn the decisions of this court in the cases of *Glasgow v. Ridgley*, 11 Mo. 34, and *Walsh v. Agnew*, 12 Mo. 520.

With the concurrence of the other judges, the judgment is affirmed.

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State v. Palmer.—Ross v. Barker.

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## THE STATE, Plaintiff in Error, v. PALMER, Defendant in Error.

1. Where a person is indicted for a felonious assault and is acquitted, the acquittal is a bar to any further proceedings; an appeal can not be prosecuted to the supreme court by the State.

*Error to Newton Circuit Court.*

Knott, (attorney general,) for the State.

EWING, Judge, delivered the opinion of the court.

The defendant was indicted for a felonious assault, and upon a plea of not guilty was tried and acquitted. On the trial the court, on the objection of the defendant, excluded certain evidence offered by the State, to which the circuit attorney excepted, and no testimony being introduced, the jury rendered a verdict of acquittal. The circuit attorney brings the case here by writ of error.

The acquittal of the defendant is a bar to any subsequent trial, and protects him against any further proceedings—the offence charged being one for which, if convicted, he would be restrained of his liberty. (Const. of Mo. art. 13, § 10; State v. Spear, 6 Mo. 645.)

The judgment is affirmed; the other judges concurring.



## ROSS, Appellant, v. BARKER, Respondent.

1. The failure of the vendee of a chattel to return or offer to return the same is no bar to an action by such vendee against the vendor on an express warranty of soundness.

*Appeal from Newton Circuit Court.*

Knott & Hough, for appellant.

- I. The court below erred in instructing the jury that, admitting all the testimony to be true, they are not entitled

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to recover; because plaintiff has failed to prove an offer to rescind the contract by returning or offering to return the negro girl Celia, mentioned in plaintiff's petition before the commencement of this suit. It is now well settled that a failure on the part of the vendee to return the thing purchased is no bar to his right of recovery for breach of warranty, though it may be a limitation upon the measure of damages. (1 Pars. on Contr. 473; 2 id. 486; Add. on Contr. 272.) In this case the court instructed the jury that a failure to return the slave was an absolute bar to the plaintiff's right to recover. (Stearns v. McCullough, 18 Mo. 414.)

*Edwards & Ewing*, for respondent.

I. The court did right in giving the instruction asked by the defendant. The plaintiff should have returned or offered to return the negro in a reasonable time after ascertaining that she was not sound. (1 Pars. on Contr. 474, 475; 1 Carr. & Pay. 15; Milner v. Tucker, 2 id. 514; Percival v. Blake, 3 id. 407; Cush v. Giles, 4 Esp. 95; Grinaldi v. White, 1 Stark. 257; Groning v. Mendham, 1 id. 477; Hopkins v. Appleby, 14 Conn. 411.)

NAPTON, Judge, delivered the opinion of the court.

This suit was for a breach of warranty of soundness in the sale of a slave, and upon the trial the court instructed the jury that the plaintiff could not recover, because there had been no offer to return the slave.

Where there was a breach of an express warranty, or a fraudulent and false representation, the liability of the vendor is not defeated by a failure on the part of the vendee to return or offer to return the property. This circumstance may affect the measure of damages, but is no bar to the action. (Fielder v. Starkie, 1 H. Black. 19.) The case of Stearns v. McCullough, 18 Mo. 414, decided by this court, recognizes this rule.

The judgment will be reversed and the case remanded; Judge Ewing concurs. Judge Scott absent.

DAVIESS COUNTY, Respondent, v. FRAME *et al.*, Appellants.

1. Judgment affirmed.

*Gardenhire*, for appellants.

*Knott*, (attorney general,) for the County.

NAPTON, Judge, delivered the opinion of the court.

The record in this case presents no point of law for review. The case was submitted to the court without instructions; and no error is assigned except the refusal of the court to grant a new trial.

The judgment is affirmed; the other judges concur.



KAUFMAN, Respondent, v. HAMM *et al.*, Appellants.

1. A promissory note given on Sunday for an antecedent debt is valid and binding. (R. C. 1855, p. —.)

*Appeal from Davies Circuit Court.*

This was an action on a promissory note. The note was given to plaintiff for a bill of groceries previously sold by him to the defendant Hamm. The plaintiff was a grocer in the city of Weston. The note was executed and delivered by the defendants to an agent of plaintiff on Sunday. It was dated back the preceding Saturday. The court refused the following declaration asked by the defendants: "If the note sued on in this cause was signed by the defendants on the first day of the week commonly called Sunday, and was also on the same Sunday delivered by the defendants to the plaintiff's agent; and if said note was taken by plaintiff's agent in the transaction of business pertaining or relating to the ordinary occupation of plaintiff, then said note is void and plaintiff can not recover in this action."

The court found for plaintiff.

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*Shambaugh*, for appellants.

I. The first declaration of law asked by defendants should have been given. The note being signed and delivered on Sunday, it is void. It was executed in violation of the statute prohibiting labor on Sunday. (See 6 Watts, 231; 18 Verm. 379; 10 Ala. 566; 2 Dougl. 73; 26 Maine, 464; 7 Blachf. 479; 9 N. H. 500; 19 Verm. 358; 6 id. 219; 2 Miles, 402; 12 Metc. 24; 10 Metc. 363; 14 Wend. 248.) The execution of the note does not come within the exceptions named in the statute. Though the note is void, the original debt may still be enforced. Our statute prohibits all kinds of work. The delivery to plaintiff's agent on Sunday was a delivery to plaintiff on that day. The evidence showing that the note was executed on a day different from its date was admissible. (1 Greenl. Ev. § 285; 2 Stark. Ev. 787.)

*Vories & Vories*, for respondent.

I. The note was valid although executed on Sunday. (See 10 Mass. 312; 8 Cow. 27; 13 Wend. 425.) The note was given for a debt fairly contracted.

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is whether a note for an antecedent debt given on Sunday is void.

Our statute makes it a misdemeanor for a person to labor himself or compel or permit his apprentice, servant, or slave, or any other person under his charge or control, to labor or perform any work, other than those of necessity or charity, on the first day of the week, commonly called Sunday.

The British statute of 29 Char. 2, ch. 7, enacted that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any wordly labor, business or work of their ordinary callings upon the Lord's day."

A considerable difference of opinion has prevailed in England relative to the proper construction of the British statute, and in this country the decisions upon similar enact-

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ments are not uniform. A reference to the cases will be found in a note to *Green v. Putnam*, 10 Mass. 313.

Our opinion is that the object of the statute will not be promoted by allowing this defence. We do not understand the act as applying to a case of this kind.

Judgment affirmed. The other judges concur.



WRIGHT, AS TRUSTEE, &C., Plaintiff in Error, v. TINSLEY *et al.*, Defendants in Error.

1. A person with whom a contract is entered into for the benefit of another may sue in his own name in enforcement of such contract without joining with him such other person; he is a trustee of an express trust within the meaning of the second section of the second article of the practice act. (R. C. 1855, p. 1217.) He may, or may not, join the beneficiary as a party in the suit.
2. An agreement to dispose of property by will in a particular way, if made on a sufficient consideration, is valid and binding.
3. Although circumstances may render it impossible to specifically enforce such an agreement exactly, yet its substantial specific enforcement will be decreed.

*Error to Callaway Circuit Court.*

Demurrer to a petition. The petition is entitled thus: "Henry T. Wright, who sues as trustee for the use and benefit of Archie G. Dawson, administrator of the estate of Mary Dawson, deceased, plaintiff, against Abram Tinsley," &c. The defendants are the executors of the will of Caleb Tinsley, deceased, and his devisees and heirs. The petition sets forth, in substance, that said Caleb Tinsley, late of Audrain county, Missouri, died in 1853, possessed of a large estate, consisting of land, negroes, choses in action, and personal property, of the value of \$15,000; that said Caleb Tinsley left a will, which was duly admitted to probate; that he bequeathed his estate as follows: to his daughter Frances Childs, one-third of the negroes and money, and a house and lot in Boonville, Mo.; to his grandchildren, the children of

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his daughter Mildred Sampson, one-third of his negroes, all the notes held by the said Caleb on their father John Sampson, and such an amount of money as would make their share equal to one-third part of said estate; to his son Abram Tinsley, a wagon and team, all the farming utensils, and the remaining third of the negroes, and money sufficient to make his share equal to a third part of said estate; that said legatees (defendants in the suit) were all the children and grandchildren of the said Caleb Tinsley, deceased, except Peachy, the wife of Henry T. Wright, plaintiff, who died prior to the death of the said Caleb, leaving a daughter, Mary Elizabeth, wife of Archie G. Dawson; "that prior to the decease of the said Caleb, that is to say, sometime in the year 1847, the said Caleb Tinsley was desirous of settling up his affairs with his children, in order that he might ascertain the amount advanced to each, so as to make an equal and impartial distribution of the property which he might die possessed of; and he was particularly desirous of having a settlement with the plaintiff Henry T. Wright, to whom the said Caleb Tinsley owed a balance of \$900 upon indebtedness which accrued against the said Caleb in favor of the said Henry T. Wright through several years' dealing. The said Caleb refused and objected to paying to the said Wright any portion of the said claim; but the said Caleb having already executed his will, wherein he had made provision for the said Henry, in right of his said wife Peachy, equally with his other children, he proposed to the said Henry T. Wright, that if he would submit the matter to arbitrators, who would make an award agreeable to his wishes and direction, he agreed and promised that the said Wright should be a legatee and devisee, and share equally with his other children in his estate after his death. Plaintiff states that in order to procure the peace, harmony and good feeling of the family, and under the existing relationship between him and the said Caleb, and in order to secure to his said daughter Mary E., and her children, her equal share of the said estate with the other children of said Caleb, he agreed and consented to

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waive his right and claims against the said Caleb and allow the same to be submitted to arbitrators, who were authorized to make an award agreeable to the feelings and dictation of the said Caleb; and the said arbitrators being chosen and duly apprised of the duties devolving upon them, and fully understanding the agreement, object and consideration of said arbitration, the said will being shown to them and the matter explained by the said Caleb, said arbitrators proceeded to adjust and settle the differences, and by their award found for the said Tinsley, who thereupon expressed himself satisfied with the same. Plaintiff states that he duly performed said award according to the requirements, by executing to the said Caleb a promissory note for the sum of four hundred and six dollars and fifty-six cents, being the amount received by the said Wright from the said Tinsley prior to the said arbitration as an advancement, the said note being by said award directed and required to be given, with the express understanding that the same should not be considered as an indebtedness by the said Wright to Tinsley, but to be held by the said Tinsley to show how much had been received by the said Wright of the estate of Tinsley, in order to make a proper deduction on a final distribution, so that each legatee should receive an equal portion. Plaintiff states that, after the making of said award, the said Caleb Tinsley destroyed the will he had made, wherein he had provided for the said Wright as aforesaid, and afterwards made another will, wherein he failed to make any provision whatever for the said Wright or his children, save and except that he bequeathed the note which he, Wright, had given to the said Tinsley for the sum of \$406.56, and he, the said Wright, and his children were otherwise excluded from all and every benefit or participation in said estate, the same being bequeathed to the above defendants as above stated, a copy of which said will is herewith filed, the original not being, &c. Plaintiff states that all the debts of said estate have been fully paid off, discharged and satisfied, and that

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after the payment of the same there was money and other property left subject to distribution of the value of \$12,000. The plaintiff proceeds to set forth the value of the interests actually received by the defendants as legatees under the said will of Caleb Tinsley, and also what there is still in the hands of the executor, Abram Tinsley. "Plaintiff prays that the said defendants be required to state severally and distinctly the amount of property and money received by them from said estate, and he prays that guardians *ad litem* be appointed for" certain of the minor defendants; "that the said executor, Abram Tinsley, be decreed and ordered to specifically execute and perform said contract so entered into by and between said Wright and the said Caleb in his lifetime; and he further prays that, in order to carry out the decree and judgment of the court, each defendant be decreed to contribute and refund such portion of the amount as may be fixed by the court to be one-fourth part of said estate, after deducting the debts, costs of administration, and the other costs and expenses incident to the settlement of said estate; and that said defendant be decreed to contribute in proportion to the respective amounts received by each, and plaintiff further prays," &c.

The defendants demurred to this petition. The following are the grounds of the demurrer: First, because the said H. T. Wright is improperly joined as a party plaintiff in said action; (second, because if, as averred, the contract was made with and for the use of the said H. T. Wright, then A. G. Dawson, administrator, is improperly joined as a party, and the suit should have been brought in the sole name of H. T. Wright;) thirdly, because there is no adequate consideration averred for the agreement sought to be enforced; fourthly, because the relief prayed for in the petition is impracticable, and this court has no power to decree a specific performance of the contract set out in the petition; fifthly, because the agreement set out relates to and concerns real estate, and the heirs of Mary Dawson should be made parties

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plaintiff in the cause ; sixthly, because Archie G. Dawson is improperly joined as a party in this suit, there being no averment of his administration.

The court sustained the demurrer.

*Jones & Hayden*, for plaintiff in error.

I. The action was properly brought by Henry T. Wright in his own name as trustee, he being the trustee of an express trust. It is no cause of complaint, although it is stated, in the style of the suit, to be for the use of another. No part of the prayer of the petition asks a judgment in favor of Archie G. Dawson, administrator of Mary Dawson. A trustee may either sue in his own name or join the beneficiary with him ; in either case he controls the judgment, and the decree is in every instance made in favor of the trustee. The mere fact that Wright styles himself the trustee of Dawson, in the margin of the petition, does not constitute Dawson a party to the suit, it being a mere recital that could not affect the judgment in the cause. (R. C. 1855, p. 1207, sec. 2.)

II. The objection, that there was not an adequate consideration to support the contract, might be answered by stating that a court of equity will not look to the adequacy of the consideration unless there be such gross inadequacy as to raise the presumption of fraud. (Adams' Eq. 79.) There was an adequate consideration. Plaintiff placed his legal rights at the disposal of the arbitrators, who, knowing the inducements and promises held out to Wright, do in the premises just what Tinsley told them to do—to acquit and release him from the debt of nine hundred dollars, and award that Wright should execute his note for the amount advanced—in consideration of which he bound himself to make Wright equal with his other children in his will.

III. Equity will enforce the specific execution of all contracts which are based upon a valuable consideration, where the consideration has been received and enjoyed by the other party against whom the execution of the contract is sought,

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providing said contract, in its terms or form, does not contravene some positive law. A court of equity, in administering relief in such a case, does not attempt to make a will for the party, but simply to carry out in good faith what the parties agreed upon. The objection that it would be making a will for the party against whom the execution of the contract is sought, if applied to this case, would be applicable alike to all other cases when the subject matter of the contract had been denied or bequeathed in violation of the contract to convey. In both cases it is the will of the testator that the devisee shall take the property, but it is in each the paramount will of the law that the contract to convey shall be carried out and the rights of the legatee or devisee are subordinate to the rights of the contractor, who, having paid his money alike in both cases on the faith of the fulfilment of the contract, is to all intents regarded as having the paramount claims of a creditor and the equitable owner of the property contracted for. (Newland on Contr. 111, 113, 114; 2 Story Eq. § 785, 786, 781; Dufour v. Ferard, 3 Vesey, 412, 416; Lord Walpole v. Lord Oxford, 3 Ves. 402; 8 Ves. 150; 6 Ves. 266; 7 Bligh, 53, 54; 9 Eng. Law & Eq. R. 136; Gilmore v. Battison, 1 Vern. 48; 3 Dessau. Ch. 195; 1 Dessau. 116.)

*Hardin, Gordon, and Guitar*, for defendants in error.

I. Admitting that the contract between Wright and Tinsley was for the use and benefit of Mrs. Dawson, Wright could not under our code sue; he was not a trustee of an express trust. (1 Menell's Prac. 324; Grinnell v. Schmidt, 2 Sandf. S. C. R. 706.) If living, Mrs. Dawson would alone be the competent party to enforce the contract; (R. C. 1855, p. 1218, § 7;) if dead, her administrator. (R. C. 1855, p. 132, § 23, 24.) If this suit is maintainable by Wright as trustee of A. G. Dawson as administrator of Mary Dawson, then we have the anomaly in our practice of one trustee suing to the use of another. Again, as there is no averment in the petition of her death and of the administration of A.

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G. Dawson on her estate, he is improperly joined as a party to the action. But the contract was made with Wright and for his use and benefit. He is therefore the only real party plaintiff. (2 R. C. 1855, p. 1217, § 2.)

II. The specific performance of contracts of sale is not a matter of course, but rests entirely in the sound discretion of the court upon a view of all the circumstances. The exercise of this power has been refused where the inadequacy of the consideration was so great as to give the agreement the character of unreasonableness, inequality and hardship. (6 Johns. Ch. 222; Seymour v. Delancey, 9 Cond. Eng. Ch. 300; 10 Mo. 774.) And where it is not in the power of the defendant specifically to perform the contract, and this was known to plaintiff before the institution of his suit, the court will not decree performance, nor compensation in damages, but leave the party to his remedy at law for a breach of the contract. (McQueen v. Chouteau's Heirs, 20 Mo. 222; Hatch v. Cobb, 4 Johns. Ch. 559; Kenyshall v. Stone, 5 Johns. 193; Hartnett v. Fielding, 2 Sch. & Lefr. 554; Morse v. Elmendorf, 11 Paige's Ch. 277.)

III. The court committed no error in sustaining the demurrer. The petition is uncertain and indefinite. It does not show clearly what the contract between Wright and Tinsley was, nor what was the action of the arbitrators; nor was it framed with a view to damages for a breach of the contract. Pleadings must show specifically the cause of action and the relief sought.

EWING, Judge, delivered the opinion of the court.

The agreement which is sought to be enforced was entered into between Wright, the plaintiff, and Caleb Tinsley, deceased, and was, as is alleged, for the benefit of Wright's daughter, Mrs. Dawson, who was the grandchild of Tinsley. But it is maintained that, notwithstanding this was the nature of the agreement, Wright could not, under our code, sue, as he was not trustee of an express trust. A trustee of an express trust is defined by our statute to include a person

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with whom or in whose name a contract is made for the benefit of another, and if the contract in question was for Mrs. Dawson's benefit, Wright obviously comes literally within this definition, and is the proper party plaintiff. If living, Mrs. Dawson would not be the proper party, for, although she might be beneficially interested, she could not sue, if the plaintiff, Wright, made the contract for her benefit, which fact constitutes him a trustee of an express trust. A trustee may, or may not, join the beneficiary in the suit; and it is no objection therefore that Dawson is named as the party for whose use the suit is prosecuted. Wright, as the trustee, is the real party to the suit, and it is exclusively within his control.

On principle, there would seem to be no ground to doubt that a person may, by valid agreement, renounce the power to dispose of his property at his pleasure; may bind himself to make a will in a particular way on proper considerations; and that courts of equity would enforce such agreements under proper circumstances, the same as in other cases of valid contracts. While in some of the cases cited the courts refused to decree a specific performance of the agreement, they all recognized the power of individuals to make binding contracts of this nature, and relief was denied on different considerations. A contract to lease by will for a good consideration will be enforced in equity. (Newland Com. 111, 113.) A contract, says Story, to make mutual wills, if one of the parties has died having made a will according to the agreement, will be decreed in equity to be specifically executed. (2 Story Eq. 785.) And upon a like principle an agreement by a father to give by will as much property to one child as another will be enforced. (Ib.) In *Garlmen v. Battison*, 1 Vern. 48, the heir at law, pretending a right to the land in question, came to the tenant in possession, who likewise claimed an interest in the fee, and threatening to evict her at law, she made a promise, if she died without issue of her body, either to give a specified sum of money or leave him the land. The tenant in possession died having

devised her land to her second husband, who had never any notice of the former agreement. A bill was brought by the heir at law to have this agreement enforced, and it was decreed against the husband. The case of *Lord Walpole v. Lord Oxford*, 3 Ves. 402, was the case of an agreement to make mutual wills, and although its execution was not decreed because of its uncertainty and vagueness, there was no question as to the power of courts of equity to enforce such agreements, nor of their inclination to do so, where they were sufficiently specific and on proper considerations.

In *Dufour et al. v. Perran et al.*, Lord Camden (as quoted by Hargrave in his juridical arguments, vol. 2, p. 310,) says, that though a will is always revocable, and the last must always be the testator's will, yet a man may so bind his assets by agreement that his will shall be a trustee for the performance of his agreement; as if he covenant to leave so much to his wife or daughter, or if he make a will and covenants not to revoke it, are common cases; and there is no difference, he remarks, between promising to make a will in such a form and making his will with a promise not to revoke it. The will is not set aside, but the devisee, heir or executor is made a trustee to perform the contract. See also the case of *Casey vs. Felton*, referred to in the same book, 297, in which the contract enforced was a contract to devise. (Fry, Spec. Per. 298.)

In *Rives v. Executors of Rives*, 3 Dessaus. Eq. 194, the agreement was made by the trustees in contemplation of marriage, and among its stipulations was one that the intended husband, in case the wife survived him, would bequeath to her by will a competent and sufficient maintenance during her life. The provision left by the will of the husband not being satisfactory and not being deemed a sufficient maintenance, upon a bill filed, it was held inadequate, and the court, by its decree, enlarged it. The Chancellor, Dessausure, in delivering the opinion, observes, that "the husband, by the agreement, had renounced the absolute power of disposing of his estate at his pleasure, or even at his

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caprice, with which the law had clothed him ; and I can not doubt that he could bind himself to do so." Alluding to cases of agreement to make mutual wills in a particular way, he remarks, that in these cases courts of equity have held the parties bound, and have made the estate of the party, who did not comply with the agreement, liable to the other party who had complied, on the happening of the event which entitled him to the benefit. He also cites as analogous in principle the case of a father promising, in consideration of the marriage of a child, to leave such child a legacy, which had been held binding on his estate after his death when he had neglected to provide ; and adds that, independently of any preceding decision, he should feel no hesitation to decide this point on principle.

In the case before us, the plaintiff, Wright, is induced to waive his claim against Tinsley to a debt of some \$900 in consideration of receiving an equal share by his will with the other children of the testator. This proposition was made by Tinsley in order that there might be an equal distribution of his property ; it is accepted by Wright with that understanding ; and an arbitration is proposed and had with a view to carry out this object. The arbitrators were apprised of the objects of it, and of the existence and contents of the will by which plaintiff's wife and children are provided for equally with the other children of the testator. By the award made in the case, the plaintiff was to give his note for some \$400, received prior thereto as an advancement. This note was accordingly executed and delivered, but with the understanding that it was not to be considered as an indebtedness, but was to be held for the purpose of equalizing the distribution of the property under the will, and as showing the proper deduction to be made from plaintiff's share of the estate. After this was done, which was in 1847, it is alleged that Tinsley destroyed the will which was the basis of the agreement, and made another, (his last will,) by which the plaintiff and his children were left unprovided for, except that he bequeathed the note which had been given to Tins-

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ley for the \$400. This arbitration, though unusual in its terms, was in effect a surrender of the debt due from Tinsley upon the faith of a promise to make the testamentary provision mentioned. On the part of Wright, the agreement has been executed, and the consideration has been received and enjoyed by the other party; and it has gone to augment an estate out of which Wright's children were to be provided for, and which provision was the sole consideration for the release of the indebtedness.

The authorities cited in support of the position—that where it is not in the power of the defendant specifically to perform the contract, and this was known to the plaintiff before the institution of the suit, neither performance nor compensation in damages will be decreed—can have no application to a case like this; and, according to these authorities, the rule is not inflexible; for it is there conceded that in special cases where there can be no specific performance, a bill may be sustained for damages. This case, however, is not like that of an agreement to convey a particular tract of land, (as in the authorities referred to,) which the party has disabled himself from executing specifically by a subsequent transfer, and the plaintiff has failed on his part as to the payment of the purchase money at the time stipulated. The agreement here is that the plaintiff's children shall have an equal share of the testator's estate. This estate is alleged to be of the value of some \$12,000 after the payment of debts, and, with the exception of one piece of town property, worth about \$3,000, consists of money and personal property. The conversion of the property into money by a sale for the purpose of distribution among the legatees, interposes no obstacle to the execution of the agreement according to its essential terms. The incapacity of the defendants to perform the contract literally and exactly, in all its parts, is no bar to a performance; if it can not be performed literally, it may yet be performed as to its substantial requirements; and it is said that all the cases in which compensation is made by the defendant are illustrations of this doctrine.

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Being of opinion that the facts set forth in the petition entitle the plaintiff to relief, the judgment will be reversed and the cause remanded; Judge Scott concurring.

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GROVER, Plaintiff in Error, v. GROVER, Defendant in Error.

1. A transcript of the proceedings of a court of Indiana had appended thereto a certificate of the clerk, in which he certified said transcript to be "a full, true and complete transcript of all the proceedings had in the above case, as now remains of record and on file in my office." The judge of the court certified the certificate and attestation of the clerk to be "in due form." *Held*, that the transcript was duly authenticated under the act of Congress.
2. In an action on a judgment of a sister state, the validity of such judgment under the law of such sister state can not be called in question; if the judgment be erroneous, it can only be vacated in a direct proceeding instituted for that purpose to the court in which it was rendered.

*Error to Johnson Circuit Court.*

This was an action on a judgment rendered in the state of Indiana. The transcript offered in evidence was authenticated in the manner set forth below in the opinion of the court. When offered in evidence by the plaintiff it was excluded, whereupon the plaintiff took a nonsuit, with leave, &c.

The final judgment or decree of the court as set forth in said transcript, after certain recitals as to the amount due the plaintiff therein, closes as follows: "It is therefore ordered and decreed by the court that the said Benjamin W. Grover pay to the said James L. Grover said sum of one thousand five hundred and twenty-three dollars and eighty-eight cents, with interest thereon at the rate of six per cent. per annum from this date until paid, and the clerk of this court is hereby ordered and directed to issue execution on this decree at the request of said complainant, which execution shall be levied on other property of said Benjamin W. Grover."

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*Hicks & Silliman*, for plaintiff in error.

I. The court erred in not permitting the transcript offered in evidence to be read. The certificate of the clerk was in proper form. The judge certified the attestation of the clerk to be in due form of law. This is conclusive. (2 Ired. 440; 3 Phill. Ev. 1132; 7 Port. 110; 11 Ala. 720; 4 Harring. 435; 2 Green, 186.) The record offered in evidence contained a sufficient judgment in favor of plaintiff against defendant. There was no variance.

*Ryland & Son*, for defendant in error.

I. The court properly excluded the transcript. It was not properly certified by the clerk. The certificate does not certify that the transcript is a full and perfect transcript of the record and proceedings in the case. The certificates of the clerk and judge must of themselves be perfect and complete. The transcript can not be resorted to to help out a defective certificate. (See 29 Mo. 345.) The transcript was properly excluded. There is a variance between the decree or judgment as set forth in the transcript and that declared on in the petition. This variance is fatal. (3 McLean, 383.)

SCOTT, Judge, delivered the opinion of the court.

This was an action on a judgment rendered in the state of Indiana. The plea was *nul tiel record*. On the production of the transcript of the judgment as evidence, it was objected that the record was not authenticated in pursuance to the laws of the United States. Here follows a copy of the attestation of the clerk:

"State of Indiana—Jefferson county, ss. I, John G. Sevring, clerk of the circuit court in and for said county, do hereby certify that the foregoing is a full, true and complete transcript of all the proceedings had in the above case as now remains of record and on file in my office.

"In testimony whereof, I have hereunto set my hand (L. s.) and the seal of said court at Madison, state and county aforesaid, this 25th day of May, A. D. 1858.

JOHN G. SEVRING, Clerk."

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The judge's certificate was as follows :

" State of Indiana—First judicial circuit, ss. I, the undersigned, at present the sole judge of the said Jefferson circuit court, and the same person who was president judge of said court at the time of the proceedings and judgments aforesaid, (the said Jefferson circuit court being now in the first judicial circuit, though it was then in the third,) do certify that John G. Sevring, whose certificate and attestation are above written, was, at the date thereof, clerk of the said Jefferson circuit court, and that his said certificate and attestation are in due form of law, and that full faith and credit are due to all his official acts.

" Witness my hand at Rosington, in said circuit, this 29th day of May, 1858. A. C. DOWNEY, Judge."

The act of Congress of May 26, 1790, prescribes that " the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."

One objection to the transcript, as stated in the record is, that the same did not appear by any sufficient certificate of any officer to be a transcript of the record and proceedings of any case in any court, the transcript of which is legal evidence under the issue in this suit. The point of this objection is not very obvious. If it is that the clerk's attestation omitted to state that the transcript is a full transcript of the "*record and proceedings*" in the cause, making the omission of the words "*record and proceedings*" the cause of the objection, we do not see on what ground such an objection can be sustained. It is true that records and judicial proceedings are the instruments to be authenticated. But the styling of a paper by the clerk a record or judicial proceeding does not make it so. Whether a paper contains a judicial proceeding is to be determined by its contents. In the case of *Lee v. Gause*, 2 Ired. 444, the objection

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seems to have been that the clerk not styling the paper, purporting to be a record, a record, it might be inferred that it was only a transcript of a part of the record of the cause between those parties, or of the minutes of the court not engrossed in the record. There the objection was disallowed. In the case of *Ferguson v. Howard*, 7 Cranch, 408, to a paper purporting to be a record, there was an attestation annexed by the clerk: "That the foregoing is truly taken from the record of the proceedings in this court." This, together with a proper certificate of the judge of the court was held sufficient. The form of the attestation of the clerk in the record before us precludes the objection that the transcript does not contain all the proceedings had in the cause. The objection is a dry, technical one, and has no foundation on any merit. But what we deem places this matter beyond controversy is the certificate of the judge of the court that the attestation of the clerk is in due form of law. The words "of law" are unnecessarily added in this certificate and are not required by the act of Congress, but we do not consider that their insertion affects its validity. The authorities are ample that when the judge certifies that the attestation of the clerk is in due form, that such certificate conclusively proves that the attestation is in the form required by the laws of the state in which he is clerk.

There is no foundation in fact for the objection that there was a variance between the petition and the record offered in evidence in the cause. The judgment on which this action is brought, as shown by the transcript, corresponds in date and amount with the judgment as stated in the petition.

We consider that the form of the entry of the judgment or decree of the court in Indiana, can not be reviewed in this action. If the judgment is erroneous, it ought to be reversed or vacated in a direct proceeding instituted in the court in which it was rendered. In this collateral action its conformity to law can no more be inquired into than it could be done in an action upon it in the state of Indiana.

Reversed and remanded. The other judges concur.

## THE STATE, Appellant, v. HOPKINS, Respondent.

1. The validity of a recognizance entered into by a party for his appearance to answer an indictment can not be determined upon a motion to quash the same; but only upon *scire facias* after forfeiture.

*Appeal from Crawford Circuit Court.*

Knott, (attorney general,) for the State.

I. This case is an exact parallel to the case of the State v. Davidson, 20 Mo. 406, in which the court held that a recognizance could not be quashed. Its validity can only be contested upon a *scire facias* after forfeiture.

Wingo, for respondent.

I. The court did not err in setting aside the judgment of forfeiture of the recognizance, and in quashing the recognizance. Hopkins entered his appearance without *scire facias*, and the recognizance was certainly void in requiring the defendant Todd to appear on the third Monday after the fourth, as mentioned in the recognizance, that being a time at which no court was held or to be held in Crawford county.

EWING, Judge, delivered the opinion of the court.

One B. F. Todd, with the respondent Hopkins as his surety, entered into a recognizance for his appearance at the circuit court to answer an indictment which had been found at the June term, 1859, for selling goods as a merchant without license. The recognizance was taken by the sheriff August 26, 1859, the condition of which is, that if the said Todd "does well and truly appear at the next regular term of the circuit court of said county, on the first day of said term, to be begun and holden in the court-house, in the town of Steelville, on the third Monday after the fourth Monday in September next, and not depart," &c. At the April term, 1860, Todd made default, and judgment of forfeiture of the

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recognizance was taken against him. Subsequently, during the same term, the respondent, Hopkins, appeared and moved the court to set aside the judgment of forfeiture and quash the recognizance, because by its terms Todd was bound to appear on the third Monday after the fourth Monday, instead of the fourth Monday in September, and the recognizance was therefore void. The time of holding the court, as fixed by law, was the fourth Monday. The motion was sustained and the State brings the case here by appeal.

It has been decided by this court that the validity of a recognizance can not be tested by a motion to quash; it can be tried only upon a *scire facias*. (State v. Davidson, 20 Mo. 408.) The recognizance is an obligation of record; and before the State commences proceedings to recover the penalty, causing a writ of *scire facias* to issue, (which of course can only be done after forfeiture, as no right of action accrues before,) there is no suit or matter of controversy over which jurisdiction could be exercised.

Whether the recognizance is invalid or not, we express no opinion, as that question is not properly before us.

Judgment reversed and the cause remanded; the other judges concurring.

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THE STATE, Appellant, v. HOPKINS, Respondent.

1. State v. Hopkins, ante, p. 404, affirmed.

*Knott*, (attorney general,) for the State.

*Wingo*, for respondent.

EWING, Judge, delivered the opinion of the court.

This case is like another of the same title, decided at this term, and for the reasons there given the judgment is reversed and the cause remanded; the other judges concurring.

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Lindsay v. Davis.

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## LINDSAY, Appellant, v. DAVIS, Respondent.

1. There must be a warranty or fraud to make the vendor of a horse with a secret malady responsible to the purchaser; the purchaser takes the risk of quality and condition, unless he protects himself by a warranty, or there has been fraud on the part of the vendor.
2. A warranty may be either verbal or written; when it rests upon oral proof, it is a question of intent, and, like any other fact, should be left to the jury.
3. A simple affirmation of soundness, or mere expression of opinion, does not constitute a warranty unless it is so intended and understood at the time.
4. Where, in a suit to recover damages for a fraudulent representation of soundness, the plaintiff avers in his petition that the disease constituting the unsoundness is glanders, he is bound to prove such allegation; although unnecessary, it is not immaterial when made.
5. Although the plaintiff in such case must show that the disease constituting the unsoundness is glanders, yet it is not necessary to show that the defendant knew that the animal sold by him was affected with the alleged form of disease; it is enough that he knew the animal was unsound.
6. It is for the jury to determine what constitutes an unsoundness.

*Appeal from Henry Circuit Court.*

This is an action by Reuben T. Lindsay against Joseph Davis. The petition has two counts. In the first count the plaintiff sets forth the purchase of sixteen mares and a jack from the defendant; that defendant warranted said mares (except one) and the jack to be sound; that they were unsound and infected with a contagious disease called "glanders;" that said mare excepted from the warranty, defendant fraudulently represented to have been diseased with a disease called "distemper," a common and not dangerous disease; that defendant knew said disease was not distemper but was glanders; that said stock was unsound; that three of said mares have died of said disease; that plaintiff has been compelled to kill another to prevent the spreading of said disease; that he is damaged, &c.

In the second count of the petition, the plaintiff sets forth that on, &c., he was the owner of a large amount of stock, &c.; that he purchased sixteen mares and a jack from the defendant; that defendant, on said sale and purchase, falsely

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represented said animals to be sound, (except one mare which he said had been diseased with distemper;) "that said animals so represented by defendant to be sound were at that time unsound and defendant knew it; that they were diseased with an infectious, contagious and fatal disease called glanders; that defendant well knew that the mare, which he stated had had distemper, was then diseased, not with distemper but with glanders, and that the balance of said animals had been and were then exposed to and liable to have said disease, if they did not then have it; that defendant fraudulently concealed from plaintiff his knowledge touching the existence of said disease among said animals, and their exposure and liability thereto as above stated; that plaintiff, confiding in the representations of the defendant, made said purchase of defendant, took said animals to his farm, not knowing or even suspecting the existence of said disease among them, whereby said disease was communicated to plaintiff's other stock." The petition then proceeds to state the nature of the damage received.

Much testimony was adduced on both sides. Its character, so far as it throws light on the opinion of the court, will be seen from the opinion. The instructions asked by plaintiff, with the exception of one with respect to the measure of damages, were refused. The following is the third instruction asked for by plaintiff and refused: "3. If the jury find from the evidence that the mares and jack, or any or either of them at the time the plaintiff purchased them of defendant, were unsound and diseased with glanders, and defendant knew they were unsound and diseased, but did not disclose to plaintiff his information and knowledge in relation to said disease, but induced the plaintiff to buy them believing they were sound, and the plaintiff had not at the time equal means of knowledge and information in regard to the existence of said disease; and that plaintiff, without knowing of said unsoundness, placed said animals among his other stock, whereby they or any of them contracted said disease, and that any of them have since died of said disease, or

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have been rendered of less value by their exposure to said disease or by having the same, the jury will find for the plaintiff, whether the defendant knew the disease was glanders or not."

The following are the instructions given for defendant: "1. There is no evidence that the defendant warranted any of the animals sound at the time of the sale. 2. Unless the jury shall believe from the evidence that the defendant, at the time of the sale of the stock to plaintiff, knew that the distemper which it had was not a temporary, but an unsoundness occasioned by the glanders, they should find a verdict for the defendant. 3. Although the jury may believe from the evidence that the stock at the time of the sale to plaintiff by defendant was diseased with a disease called glanders, yet, if the jury believe from the evidence that the defendant did not know that it was glanders, but honestly believed that it was distemper, and in good faith merely gave it as his opinion that it was distemper, then they should find for defendant. 4. Although the jury may believe from the evidence that the stock sold by defendant to plaintiff was diseased, yet, unless that disease was the glanders, they must find for the defendant. 5. Although the jury may believe from the evidence that at the time of the sale of said stock by the defendant to plaintiff the same was diseased with a disease called glanders, yet unless they further believe from the evidence that defendant knew it, and did not disclose it, and concealed the same from plaintiff, or made some statement to the plaintiff which defendant knew was untrue or calculated to deceive plaintiff, they must find for defendant."

The jury found for defendant.

*Peyton & Loan*, for appellant.

I. The court improperly refused instructions asked by plaintiff. The first instruction given for defendant was improperly given. The evidence of Bruce tended to prove a warranty of soundness. (26 Mo. 523; 18 Mo. 171.) The other instructions given for defendant are also erro-

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neous. It was not necessary to a recovery by plaintiff that defendant should have known that the stock sold plaintiff was diseased with glanders. The plaintiff does not state in his second count that defendant knew the stock sold had the glanders. The charge is that the stock were unsound, and that defendant, knowing them to be unsound, fraudulently represented them to be sound. The other statements in said count with reference to said unsoundness are only by way of aggravation and need not be proved. (1 Greenl. Ev. § 61; *Barnum v. Van Dusen*, 16 Mo. 204.) It is not charged that defendant knew the unsoundness to be glanders. It was not necessary to prove that defendant knew the unsoundness to be glanders. (16 Conn. 204.)

*Ryland & Son, Johnson, Freeman & Wright*, for respondent.

I. There was no warranty in the sale. The words used do not amount to a warranty. (2 East, 314; 9 Watts, 55; *Moses v. Mead*, 1 Denio, 385; *Emerson v. Brigham*, 10 Mass. 207; *Sweet v. Colgate*, 20 Johns. 203; *Foster v. Caldwell*, 18 Verm. 176.) The testimony did not make it appear that defendant knew the animals were diseased when sold; nor does it appear that he made any misrepresentations, or any artifices or inducements to plaintiff to induce him to buy. The plaintiff was bound to prove the unsoundness as charged. The damages charged are too remote and consequential. (12 Mo. 313; 13 Mo. 517; *Sedgw. on Dam.* 135.)

NAPTON, Judge, delivered the opinion of the court.

There were two questions involved in the trial of this cause; and the leading principle pervading the instructions, which the court gave to the jury, was undoubtedly correct. One question was, whether there was a warranty; the other was, whether there was any fraud. There must be a warranty or fraud to hold the vendor of a horse with a secret malady responsible to the purchaser. The maxim that a sound price implies a sound commodity, although a favorite

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one in the civil law, and occasionally borrowed to settle questions under our system, has never met with general favor, or taken root as a permanent part of the common law. Our law is, that the buyer takes the risk of quality and condition, unless he protects himself by a warranty, or there has been a false representation fraudulently made by the vendor.

This principle was the one upon which the court proceeded in trying this case, and, so far, the action of the court was unexceptionable. In carrying out the principle, however, there were instructions given to which exceptions were taken, and the propriety of these instructions presents the only point for our consideration.

In relation to the alleged warranty, the court disposed of the subject by instructing the jury that there was no evidence to support the allegation. A warranty may be verbal or written; when it is reduced to writing, it is the province of the court to expound it; but when it is merely verbal, it is for the jury to interpret the words of the witness who testifies concerning it. The court may explain to the jury what constitutes a warranty, when it rests altogether on oral proof; but as no particular form of words is essential, and it is mostly a question of intention on the part of both the vendor and vendee, that question, like any other question of fact, must be left to the jury.

Of course, when there is no evidence of any such warranty, there can be no necessity for any instructions on the subject, and such was the opinion of the circuit court in this case. The only evidence on this point was that of a single witness—the only one present at the trade between plaintiff and defendant—who testified that, in answer to a question, put by the plaintiff to the defendant, as to whether “the stock was sound,” the defendant replied that “*he thought it was.*”

It appears to be the prevailing opinion, both in this country and in England, that a simple affirmation of soundness does not constitute a warranty, unless it is so intended and understood at the time. In *McFarland v. Newman*, 9 Watts,

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55, Judge Gibson said that such a naked averment was "neither a warranty nor evidence of a warranty." In connection with other circumstances, the learned judge admitted that "it certainly may be taken into consideration; but the jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representation. Should he have used expressions fairly importing a willingness to be thus bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty, merely because the vendee had gratuitously relied on it; but not to have exacted a direct engagement, had he designed to buy on the vendor's judgment, must be accounted an instance of folly."

It is true that at a trial at *nisi prius* in England, Lord Ellenborough seemingly advanced a very different doctrine, (4 C. & P. 45,) where the expression of a horse-trader in selling his horse was, "*I never warrant*; but he is sound as far as I know;" and this was held by the learned judge a warranty." But this expression of the vendor was in answer to a direct question put to him by the vendee, "Will you warrant him?" and Lord Ellenborough may have felt himself at liberty to treat the reply as evasive and intended to produce the impression of an affirmative answer. However this may be, it is believed the decision has not been followed in England, and it has been criticised with much severity by Chief Justice Gibson, and treated as a complete perversion of the man's language, and entirely unjustifiable.

The answer of the defendant, Davis, in this case, as testified to by the witness, was not even an affirmation of soundness, but a mere expression of opinion. Whether the circumstances under which it was made, together with the prior and subsequent conversation, would have any tendency to control the natural and obvious meaning of the language used, would be a matter of inquiry for the jury, if there was any evidence whatever tending to throw any doubt upon the agreement and understanding of the parties. We pass by

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this branch of the subject, however, for the reason that our examination of the evidence has not satisfied us that the question of warranty could have had much influence in the determination of the case, and that whether tried by a court or a jury, the result would probably be the same. We have referred to it principally to state, that where a warranty is insisted on, depending altogether or in part on oral proof, the question properly belongs to the jury, and if there is any evidence tending to establish the allegation, the court should submit the matter to the jury, with such explanations as the facts in evidence might justify.

The second and main ground of objection to the instructions of the court is based upon the construction which the court seems to have given to the allegations of the petition concerning fraudulent misrepresentations. The second count of the declaration avers that the animals purchased by plaintiff were unsound, and that defendant knew it. There is, then, a further averment that the disease constituting the unsoundness was glanders. This last averment was unnecessary; whether the disease was glanders or distemper, or any other infirmity not obvious upon inspection, which impaired the value of the mares for the purposes contemplated by the parties to the trade, the responsibility of the vendor for a false and fraudulent misrepresentation of their condition was alike in either contingency. But as the pleader thought proper to aver the character and name of the disease, he was bound to prove it. An averment may be unnecessary and yet not immaterial or impertinent, when made; and unnecessary averments, if they are not also immaterial, must be proved.

What constitutes an unsoundness is a matter for the jury. It is not the province of the judge to determine the character of diseases. When we say, therefore, that distemper would have been an unsoundness as well as glanders, we mean, of course, if the jury should so consider it from the evidence submitted to them. Whether glanders is an aggravated form of distemper or a distinct disease, or whether

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either of the diseases would constitute an unsoundness, are questions of fact with which the court has nothing to do.

The objection to the instructions is, that they required the plaintiff to prove, not only that the alleged disease was glanders, but that the defendant knew that the animals had that specific disease. There is no averment in the petition to this effect. It is alleged that the mares and jack were unsound, and that the defendant knew *they were unsound*; but it is not said that he was acquainted with the specific disease of which, it is said, a portion of the animals died, and with which, it is averred, they were all affected at the time of the sale. It was not material that the defendant should have been acquainted with the nature or name of the disease, if disease there was; it was enough that he knew the animals were unsound, if, indeed, the fact was so. The fraud was the same, if the defendant stated the animals to be sound when he knew them to be unsound, whether the unsoundness turned out to be distemper or glanders, or any other form of disease. The plaintiff avers in this case that the disease was glanders, but he does not aver that the defendant knew that fact; but merely that the defendant knew them to be unsound. We can very well imagine that the animals may have had the glanders, and that the defendant was well apprised of their unsound condition, but may have been totally ignorant of that specific disease and all its characteristics. In that event, he would be justly held responsible for a false representation, although under the instructions given by the court upon the trial, it is obvious that, upon the hypothesis named, the jury were bound to find for the defendant.

The third instruction asked by the plaintiff should have been given, and the second, third and fourth given for the defendant ought to have been refused. We shall therefore remand the case for a new trial.

Judgment reversed and case remanded. The other judges concur.

FAUST'S ADMINISTRATRIX, Defendant in Error, v. BIRNER *et al.*, Plaintiffs in Error.

1. The words "dying without issue" must, in this state, since the revised code of 1845 went into effect, be construed to mean dying without issue living at the death of the person named as ancestor.
2. A testator made a bequest as follows: "I direct that if my wife M. should have a child by me, that such child shall have and receive of my estate the sum of two hundred dollars," &c. After making another specific devise, he proceeded as follows: "I give and bequeath to my wife M. all the residue of my estate, real and personal, for and during her natural lifetime," with remainder over. The wife at the death of the testator was pregnant with a child, which was afterwards still-born. *Held*, that the bequest of the two hundred dollars was not a lapsed legacy, but was embraced in the devise to the wife.
3. The doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of a compromise, a court of equity will grant him relief, is to be understood with many qualifications; family compromises upon doubted, if not doubtful, rights and mutual claims and mutual ignorance of the law, are generally sustained by the courts; to authorize the courts to grant relief there should, it seems, be something more than mere ignorance of the law; there should be imposition or undue influence.

*Error to Cole Circuit Court.*

John Birner died in 1845, leaving a will, dated September 1, 1845, of which the provisions are as follows: "First, I direct that all my debts, &c.; second, I direct that if my wife Margaretta should have a child by me, that such child shall have and receive of my estate the sum of two hundred dollars out of my estate, to be paid to such child on arriving at age. I direct the said sum shall remain a charge on my real estate until said child arrives at the age of twelve years, at which time I further direct said sum to be raised from my real estate, and the same to be loaned out at interest for the benefit of my child; thirdly, in consideration that my brother Andreas Birner advanced a part of the money with which I purchased the farm where I now live, I give and bequeath to my said brother forty acres of land of said farm in full discharge of all sums of money due by me, which

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may be allotted to him at any time after my death ; fourth, I give and bequeath to my wife Margaretta all the residue of my estate, real and personal, for and during her natural lifetime, and after her death, without other issue than the above referred to, then to my said child ; but if my said wife should again marry and have other children, then I direct that the property lastly above bequeathed shall be equally divided between my child and the children of my wife, the issue of such second marriage ; or if my wife should die without issue, then I direct that all my property shall be equally divided between my two brothers Andreas Birner and George Birner, except the forty acres of land first given to my brother Andreas ; lastly, I appoint my wife executrix," &c.

The child with which said Margaretta was pregnant at the death of her said husband was not born alive. The said Margaretta afterwards married John B. Faust, by whom she had three children. Faust has since died. This suit is brought by the said Margaretta, as administratrix, to recover back a sum of money paid by plaintiff's intestate to the defendants, Andreas and George Birner, the brothers of plaintiff's first husband, under the following circumstances as set forth in plaintiff's petition. The petition sets forth the provisions of the above will ; that plaintiff intermarried with Faust ; that Faust was a foreigner by birth and did not understand the English language well, and was ignorant and unacquainted with the nature of land titles in this state ; that defendants falsely and fraudulently represented to him that they had a title to an interest in said lands ; that he, relying on their representations and intimidated by their threats, was induced, in 1853, to pay to defendants the sum of \$320 for their pretended title to said land ; that they at the same time made to said Faust a warranty deed to the same ; that defendants never owned said land or had any interest therein, and never had possession ; that the title from defendants to said Faust has wholly failed.

Evidence was adduced to show that a dispute arose between said Faust and the defendants as to the interests con-

ferred by said will of John Birner, the defendants claiming an interest and threatening to turn Faust out of possession in case of Mrs. Faust's death. In 1853 the said Faust paid to defendants \$320 by way of compromise of their claims upon the land, and the defendants executed a deed granting the land to said Faust. At the date of this deed Mrs. Faust had one child by said Faust.

The court, at the instance of plaintiff, gave the jury the following instruction: "1. If the jury are satisfied from the evidence that Mrs. Faust had one child living by her second marriage at the time of the execution of the deed read in evidence, by a plain and settled principle of law the defendants had no interest in the land in question under the will; and if Faust, acting in ignorance of this plain and settled principle of law, was induced by defendants to pay them the amount mentioned in the petition as therein stated, they must find for the plaintiff."

The defendants asked various instructions, some of which were given, and some refused. It is deemed unnecessary to set them forth.

*Parsons*, for plaintiff in error.

I. The court should have sustained the demurrer. If the title of the heirs of Faust had failed, the action on the covenant of warranty descended to the heirs and not to the administratrix. (1 Chitt. Plead. 16.) No specific threats against the person, property or character of Faust were charged. The plaintiff does not, in asking for the purchase money, propose to rescind the deed of conveyance. The instruction given should have been refused. If the parties acted in ignorance and for the purpose of adjusting their difficulties, without fraud, misrepresentation or duress, to induce the acceptance of the terms of the compromise, it was valid and binding in law and equity. The defendants had an interest in the land. There was a lapsed legacy, which descended to the defendants as heirs at law. (4 Kent, Com. 541, 542.) Had Mrs. Faust at any time died without

leaving a child or children, the whole estate would have become vested in the defendants. They had therefore a contingent interest. The court should have given the instructions asked by the defendants. If the parties compromised their conflicting claims, neither law nor equity will interfere, although it might appear that one of their claims was groundless. (*Lowber v. Selden*, 11 How. Prac. 526.)

*White & Gardenhire*, for defendants in error.

I. Omissions of the petition, if any, are cured by the verdict. (1 Chitt. Plead. 673.) The plaintiff had a right to sue. (3 Mo. 401.) The grantors having no title, the covenant was broken as soon as made. (*Collier v. Gamble*, 10 Mo. 467.) The heirs acquired nothing by the deed. The grantors had no title to convey. If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of a compromise, he will be relieved from the effect of his mistake. (1 Sto. Eq. § 121.) The jury have so found. The judgment is for the right party. The covenant being personal, and having been broken when made, the defendants had the right to recover back the purchase money with interest. The case was not put upon this ground in the court below, but it might have been. There was no lapsed legacy.

NAPTON, Judge, delivered the opinion of the court.

In this case we have not been able to perceive, as the court declared in the instructions to the jury, that "by a plain and settled principle of law the defendants (G. and A. Birner) had no interest in the land in question under the will" of their brother, at the date of the compromise. The will of John Birner, as we understand it, devised the entire estate to his wife, for life, with remainder to her children, and then provided that if his wife should die without issue, all his property should be divided between his two brothers. This is a good executory devise to the brothers. Our statute

provides that the words "dying without issue" shall not be construed to mean an indefinite failure of issue, but that they shall be construed to mean dying without issue living at the death of the first taker. The contingency is not therefore too remote, for it must be determined at the death of the wife.

If the instruction had reference to a supposed interest of the brothers in the legacy provided by the testator for the child of which his wife was then pregnant, we concur with the circuit judge in his construction of the will. This provision was contingent, and it was the intention of the testator, if the contingency never happened, by the fourth clause of the will, to dispose of his entire estate, except the forty acres of land devised to his brother in the preceding clause. When the testator, therefore, spoke of the *residue* of his estate in the fourth clause of his will, he intended to include the legacy provided for his expected child, if such expectations failed. There was, therefore, no lapsed legacy by reason of the testator's child not being born alive.

The instruction appears to be based on the doctrine stated by Judge Story, in his Treatise on Equity, that "if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake." (1 Story, Eq. § 121.)

This principle is laid down by Judge Story with great caution and with many qualifications, as an examination of succeeding sections of the chapter where it occurs will show. Indeed, in the same section, the commentator adds, "that where a doubtful question arises respecting the true construction of a will, a different rule prevails, and a compromise fairly entered into, with due deliberation, will be upheld in a court of equity."

But what is a plain and settled principle of law? Is it meant such rules as a long series of judicial decisions or statutory provisions have fixed, and which are understood by

the community at large, as well as by the profession whose business it is to investigate such subjects? If so, how can it apply to the construction of this will? There was undoubtedly a controversy among the parties in relation to its construction, and it was not their understanding, we may infer, that the true construction was plain or settled. When a will is construed by an authoritative decision, it is settled undoubtedly, and the construction was law just as well before the decision as after; for it is not the province of courts to make but declare the law; but in this sense all principles of law may be said to be plain and settled, and litigated cases could never be compromised. When we look at the cases to which Judge Story refers, in illustration of this doctrine, we see that there is generally something more than a mere ignorance of the law; that the circumstances lead to suspicions of fraud, imposition, misrepresentation, or undue influence on one side, and imbecility, credulity or blind confidence on the other. Take the first case mentioned, that of a first-born son in England dividing his estate with a younger brother, in ignorance of the law of primogeniture. Every tolerably well-informed person in England may be presumed to know that the fee simple estates of the ancestor descend to the eldest son; and, if a contract is made in ignorance of this "plain and settled principle of law," a court may well infer that there must be either fraud or imbecility. But how different is that case from the present! Here is a will, concerning the meaning of which parties interested differ, lawyers consulted differ, and the courts do not altogether agree, as it turns out. A claim is set up on one side and bought out by the other, and because the opinion of the courts may be that the claim had no valid foundation, is it the law that the contract must be set aside and the purchase money returned? The case of *Bingham v. Bingham*, 1 Ves. 126, is not unlike this, but the report of this case is thought to be meagre, and its authority, as reported, is questioned. (See 1 Story, Eq. § 129.) Family compromises upon doubted, if not doubtful, rights and mu-

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tual claims and mutual ignorance of the law, are generally sustained by the courts.

The instruction of the court was then, in our opinion, erroneous. But we will not be understood, in disapproving the instruction on which the case went to the jury, as deciding that the plaintiff was not entitled to recover. There may have been gross ignorance and imbecility on one side, and a perfect knowledge of the facts and the law on the other; there may have been imposition or undue influence; there may have been circumstances from which a jury might infer fraud. All these things are charged, but the allegations were not tried. The case turned altogether upon another point. We shall remand the case for a new trial.

Judgment reversed and case remanded. The other judges concur.

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WERTHEIMER, Plaintiff in Error, HOWARD, Defendant in Error.

1. All the acts which, from the beginning to the end of a suit, the law requires a justice of the peace to perform, are, it seems, to be regarded as judicial and as involving only that responsibility which attends all judicial officers; in issuing an execution, a justice of the peace is not to be held responsible as a mere ministerial officer.
2. A judgment was obtained before a justice of the peace; the justice issued execution thereon by direction of the plaintiff, but made the same returnable in sixty instead of ninety days, as required by law, by reason of which the plaintiff lost, and became unable to make, the amount of the debt out of the defendant. *Held*, in an action against the justice to recover damages for the negligent and illegal issue of the execution, that the justice was not liable; that the act of the justice was to be regarded as judicial and not ministerial merely.

*Error to Cooper Circuit Court.*

The plaintiff sets forth in his petition in this cause that the defendant, in July, 1857, was a justice of the peace, duly elected and qualified, for Boonville township, Cooper county; that on July 11, 1857, the plaintiff recovered two judgments

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before the defendant as justice of the peace against one Christian Mittleback, each for \$181.40, together with costs; that he directed said justice forthwith to issue executions upon said judgments; that the said justice did so issue, but, in filling up, preparing and issuing the same, so negligently, carelessly and improperly filled up, wrote, prepared and issued said executions, that the same were illegal and void and of no effect, in this, to-wit, that they were made returnable in sixty instead of ninety days as required by law; that if said executions had been properly prepared and issued, plaintiff would have been able to secure and receive the amount of said judgments so recovered, but that, by reason of the negligence and carelessness of said defendant in preparing and issuing the same, plaintiff has lost and is unable to make the amount of said judgments out of the said Christian Mittleback.

The court sustained a demurrer to this petition.

*Henning*, for plaintiff in error.

I. The circuit court erred in sustaining the demurrer. A justice of the peace is liable to an action for error or misconduct in the performance of a ministerial act. (*Stone v. Graves*, 8 Mo. 147.) The issuing of an execution is a ministerial act. An execution issued by a justice returnable in less than the time required by law is void. (*Stevens v. Chouteau*, 11 Mo. 384; *Williams v. Bower*, 26 Mo. 602.) The execution could not be amended under the statute. (*R. C. 1855*, p. 945.) This power of amendment can only be exercised in open court. An execution is rarely if ever issued until the justice's law day is over. The justice can not amend of his own motion. The execution passes directly from the justice to the constable.

*Muir & Draffen*, for defendant in error.

I. The petition shows no cause of action against the defendant. It can not be seen whether the judgments were valid or not. If founded on notes, the justice had jurisdiction;

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if on accounts, he had none. A justice of the peace is not responsible for an error or mistake committed by him in the performance of a judicial act within the scope of his jurisdiction. (Gregory v. Brown, 4 Bibb, 29.) The executions were not void upon their faces, but merely voidable. (4 Bibb, 332; 11 Mo. 189.) Justices have the power now to amend writs. (R. C. 1855, p. —, tit. Justices' Courts, art. 4, § 36.) The case of Stone v. Graves, 8 Mo. 148, does not decide the question presented here.

NAPTON, Judge, delivered the opinion of the court.

This case is an embarrassing one, in view of the multiplied and conflicting opinions which have been entertained concerning ministerial and judicial acts; but after considerable reflection, our conclusion has been to let the judgment of the circuit court stand.

The difficulties in drawing a line of distinction between judicial and ministerial acts, in reference to the duties which our statutes have confided to justices of the peace, are not readily removed; and, upon principles of public policy as well as equity, we are not disposed, in determining their responsibilities, to adopt the rules which have been applied to clerks and sheriffs and other mere ministerial officers. The clerical and judicial acts of justices are mingled together from the beginning to the end of a suit, and it is not easy to separate the one from the other. Great inconvenience, we also apprehend, would arise from holding a justice responsible for a blunder in issuing an execution where his intentions have been altogether pure. The office, at least in the great majority of instances, is not one attended with large gains; nor can it generally be relied on for a mere subsistence, but must necessarily be filled by persons whose principal pursuit will not allow an appropriation of much time or labor to the attainment of accurate legal information, even upon those subjects with which they have officially to deal. That the justice is required or allowed to be his own clerk, is not a sufficient reason to divest him of his judicial charac-

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ter whenever he performs an act, which a clerk, under other circumstances, would do. We have not been able to see, therefore, that in issuing an execution he is to be held responsible as a mere ministerial officer, but our inclination is to hold all his acts, which from the beginning to the end of a suit the law requires him to perform, as judicial and involving only that responsibility which attends all judicial officers. Judgment affirmed.

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JOHNSON, Appellant, v. JEFFRIES, Respondent.

1. A mortgage or deed of trust of personal property is valid between the parties thereto, although possession may not accompany the deed, and no record be made thereof.
2. The eighth section of the act concerning fraudulent conveyances, (R. C. 1855, p. 804,) providing that no mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession thereof be delivered to and retained by the mortgagee, or trustee, or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded, can not be invoked by all persons indiscriminately, whether trespassers or wrongdoers; to entitle a person to invoke the aid of this provision against the mortgagee, or trustee, or *cestui que trust*, he must show himself related in some way to the parties to the instrument.

*Appeal from Greene Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Edwards & Ewing*, for appellant.

I. The court erred in excluding from the jury the deed from Bartlett to plaintiff. As between the parties to the deed, it is valid, although not acknowledged or proved, as the law requires to make it good against third persons. The defendant does not claim that he is the owner of the slave, but that plaintiff is not. He is not a third party within the meaning of the eighth section of the act concerning fraudulent conveyances. (R. C. 1855, p. —, § 8.) The evidence

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shows conclusively that the slave was the property of Bartlett, and that defendant is merely in possession of her without a shadow of title, without setting up any claim whatever to the title, and without any authority whatever. The court erred in excluding the declarations of the defendant; so also in excluding the deposition of Dales.

EWING, Judge, delivered the opinion of the court.

This was an action to recover the possession of a slave which was alleged to be unlawfully detained by Jeffries. The plaintiff's claim is based upon a mortgage or deed of trust with power of sale executed to him by one Bartlett to secure the payment of certain promissory notes in which he was Bartlett's security, and which he alleges he paid, whereby he became entitled to the possession of the slave.

The answer denied that Bartlett was the owner of the slave, and that the defendant unlawfully detained her from plaintiff's possession. On the trial the plaintiff offered the deed in evidence, which was excluded by the court on the ground that it had not been acknowledged and recorded; and this ruling of the court is assigned for error.

The statute on this subject declares that no mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee, or trustee, or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are by law directed to be acknowledged and recorded.

The deed, as between the parties thereto, is good, although not acknowledged and recorded, and the defendant does not appear to be in a position to claim the benefit of the statute or to question the validity of the instrument in question. The answer sets up no title in the defendant to the slave, and it discloses nothing that would preclude Johnson from using the deed as evidence of his alleged right to the prop-

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erty. It does not appear that Jeffries stands in any such relation to the parties to the instrument—as, for instance, a purchaser or creditor—as that he would be prejudiced by giving effect to the deed. An illustration of the evident intent and meaning of the statute would be seen in the protection it would afford a subsequent purchaser from the mortgagor—who as mortgagor should retain the possession of the property, there being no registry of the instrument—in a suit by the mortgagee to recover it from such a purchaser. The purchaser in such case could, with great propriety, claim the protection of the statute; and the deed could not be used to defeat his title to the property. It is a great misconception of the statute to so interpret it as to apply to all persons indiscriminately, except the parties to the instrument, and thus permit any third person, a trespasser or wrongdoer it may be, to invoke its aid. The deed which was the foundation of the plaintiff's title to the property having been excluded, the other evidence offered was, we suppose, deemed immaterial.

The judgment will be reversed and the cause remanded; Judge Napton concurring. Judge Scott absent.

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FULBRIGHT, Respondent, v. CANNEFOX *et al.*, Appellants.

1. Infants can not appear by attorney as parties plaintiff in actions for partition; they must sue by guardian.
2. Judgments rendered in proceedings where infants appear by attorney are not nullities as to them; they are voidable, and may be set aside on terms.
3. It is the duty of the court, in proceedings for partition, to see that all the title of the parties to the suit is conveyed by the judgment. Hence, where in proceedings for partition one of the plaintiffs, an infant, appeared by attorney, and the sheriff afterwards instituted suit on a note given to him by a purchaser at the partition sale, who defended on the ground that the judgment in partition was invalid as to such minor, who had since become of age; *held*, that, before compelling the purchaser to pay the note given for the land purchased at the partition, it would be proper that the question as to the acquiescence of such minor in the partition judgment and sale should be satisfactorily settled.

*Appeal from Greene Circuit Court.*

In the year 1855 proceedings for the partition of the real estate of Joseph Cannefox, deceased, were instituted by his widow and heirs. All the parties to the suit were made parties plaintiff, among others Sarah J. Humphries, a minor daughter of said Cannefox, whose husband had previously died. She appeared by attorney, no guardian being appointed. The court ordered a sale of the property, and upon the sale William J. Cannefox became the purchaser of a portion of the land, and gave his note to the sheriff for \$2,080, with Sarah Cannefox and others as securities. This note the sheriff instituted suit upon to the use of the heirs of said Joseph Cannefox. The sheriff's return states that he executed the writ of summons on Sarah Cannefox by "leaving a true copy of the within writ with a white member of the family over the age of fifteen years;" but does not state that the copy was left at the usual place of abode of said Sarah Cannefox. At the return term, March term, 1858, judgment by default was rendered against the defendants. At the same term the defendants moved the court to set aside said judgment on the ground that the defendants thought and believed, when said default was rendered, that William Cannefox, the principal in the note, and the purchaser at the sheriff's sale, would get a good title upon the payment of the note; that since said judgment by default they had ascertained that said partition proceedings were irregular, and that no valid title would pass to said W. Cannefox. The court overruled the motion. At the March term, 1859, said William J. Cannefox moved the court again to be permitted to answer. He set forth that he made no defence and let judgment go by default because he then thought he had no defence, but that he had since learned that the petition for partition was not regular, and that the proceedings were void, inasmuch as there was no party defendant and there were minor plaintiffs. This motion also the court overruled.

At the same term a motion in arrest of judgment was made on the ground that the sheriff, the plaintiff, was not the real party in interest. This motion was overruled. At the same term, the defendant Sarah Cannefox moved the court to set aside the judgment because she received no legal notice of the commencement of the suit. This motion was overruled. Afterwards, and at the same term, the defendants presented their petition to the court praying a stay of execution. In this petition the parties set forth, among other things, that in the said partition proceedings there were three minor plaintiffs, one of whom, Sarah J. Humphries, appeared in person without guardian. This petition, on motion, the court overruled at the August term, 1859.

*Orr & Richardson*, for appellants.

I. The court had no jurisdiction of the person of Sarah Cannefox, she not being served. The court erred in overruling her motion. The judgment is void as to her. The petition in partition was signed by a minor and therefore the proceedings are void. Infants can only appear by guardian or next friend. (*Thornton v. Thornton*, 27 Mo. 302.) A sale in partition is a sale by the parties themselves. A warranty of title is implied. (*Picot v. Page*, 26 Mo. 420.) The proceedings in partition being so irregular as to make them void, the purchaser should not be held to pay the money without getting a title. The sheriff had no right to bring suit in his own name.

*Parsons*, for respondent.

I. No meritorious defence was set up in the motion to set aside the default. In suits for partition, infants may appear as parties plaintiff by guardian. (27 Mo. 305.) The petition to stay execution was properly overruled. It does not appear that they were not apprised of all the facts relating to the partition and sale at the time of the purchase. It does not appear that they exercised due diligence.

NAPTON, Judge, delivered the opinion of the court.

All the facts which we think necessary to enable the court to make a satisfactory and equitable adjustment of this controversy are not before the court. The main defence, originally set up in the case, undoubtedly proceeded upon grounds which would not now be considered available and which were so determined on the trial. But the case ultimately took another turn, and the principal point finally relied on as a defence to this suit was the infancy of Sarah J. Humphries, one of the parties plaintiff in the partition proceeding, and her appearance by attorney. It was also insisted that one of the defendants in this suit, Sarah Cannefox, was not properly served, and that the default against her should have been set aside for this reason.

In relation to this last point, we think it sufficient to observe that, whether served with notice or not, Sarah Cannefox appeared with the other parties defendant and participated in all the proceedings subsequent to the default. It would be folly to send the case back for this cause alone, as it would only tend to create expense to no purpose. Admitting that the default should have been set aside, yet, as there were repeated continuances, and all the defences which could have been offered previous to the default were heard in fact and tried upon subsequent motions, in which Sarah Cannefox, the party not sued, as well as the other defendants, united, there is evidently no merit in the defence of want of notice.

The main fact relied on to set aside the judgment in this case is that Sarah J. Humphries, one of the minor plaintiffs in the suit for partition, appeared by attorney. There is no question that this makes the judgment in partition voidable, but it does not appear that the party thus appearing by attorney desires to avoid the judgment. In truth, the present action, which is brought by Fulbright for the benefit of all the partitioners upon a note given for the sale of the land

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or a portion of it, would seem to indicate an acquiescence on the part of Sarah J. Humphries in the judgment. A court would not permit her to set aside the judgment and at the same time retain the purchase money of the land. Such judgments are not nullities, but may be set aside on terms. (See the case of *Gott v. Powell*, 30 Mo. —.) \*

But the judgment in partition was, so far as S. J. Cannefox was concerned, undoubtedly liable to be reversed or annulled, and as the court ought to see, in these partition proceedings, that all the title of the parties to the partition suit is conveyed by the judgment, we can see no impropriety in having this matter settled in the suit upon the note, when the point is brought to the attention of the court. It may be that Mrs. Humphries, who is now of age, is willing to make a deed, and thus end all doubt or difficulty on the question. It may be that in some other mode her acquiescence in the judgment could be procured; and if, as has been suggested, the purchasers are anxious to complete their bargain, provided they can be assured of a good title, the whole matter may be readily settled in the present suit without forcing the purchasers to rely upon a mere implication that the participation of Mrs. Humphries in the present suit is to be regarded as a ratification of the judgment in the partition proceedings. We shall therefore remand the case in order that these questions may be satisfactorily settled before compelling the purchasers to pay the amount of their bonds. Judgment reversed and remanded. The other judges concur.

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BALDWIN *et al.*, Respondents, v. DILLON, Appellant.

1. In suits for the possession of personal property, under the eighth article of the practice act of 1849 (Sess. Acts, 1849, p. 82,) if the defendant gave a forthcoming bond, as allowed by said article, with sureties, judgment could be rendered against the sureties only in the mode pointed out in the ninth section of said article.

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\* This case is still pending upon a motion for a rehearing.

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*Appeal from Buchanan Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.

*Hall, Vories & Vories*, for appellant.

I. The court improperly excluded from the jury the will of W. P. Flint. The instructions given were erroneous. The verdict and judgment are entirely erroneous. The verdict is a verdict in trover for damages. The court could not on such a verdict render a judgment against the securities. (4 Black. 19; 13 Mo. 209.) The verdict is not in conformity to law.

*Woodson & Loan*, for respondents.

I. The court committed no error in giving or refusing instructions. The instructions given on the part of the plaintiff, as qualified and restricted by those given on the part of defendant, presented the law of the case fairly before the jury, and the judgment of the court ought not to be reversed on account of an erroneous instruction, which it is evident could not have prejudiced the party excepting. (7 Mo. 416; 8 id. 224; 9 Mo. 302; 10 Mo. 62.) Some three or four witnesses fix the value of the slave at one thousand dollars. No injury was done the defendant. The judgment is sufficient. (*Hoenthal v. Watson*, 28 Mo. 360.)

NAPTON, Judge, delivered the opinion of the court.

This suit was brought to recover a slave which the plaintiffs alleged to belong to them. The suit was brought under the provisions of the eighth article of the act of 1849. One of the instructions, given by the court to the jury which tried the case, was that the measure of damages was the value of the slave at the commencement of the suit and six per cent. interest thereon. The verdict of the jury was, "We, the jury, find for the plaintiffs and assess their damages at eight hundred dollars, and interest at six per cent. from the commencement of the suit, being nine hundred and thirty-six dollars and fifty cents." The judgment was, that plain-

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tiff recover nine hundred and thirty-six dollars and fifty cents against the defendant and his securities in the bond given to the sheriff for the detention of said slave, as and for their damages, and also their costs and charges.

The suit appears to have been tried by the court and jury as an action of trover would have been before the introduction of the new system of pleading. The value of the slave was not found, nor was any judgment rendered for the return of the slave to the plaintiffs. The finding of the jury may be understood as a finding that the plaintiffs were the owners of the property sued for and were entitled to the possession. The value of the slave is given, as we conjecture, in the form of damages, inasmuch as the instructions of the court authorized the jury to assess the value of the slave at the commencement of the suit as damages.

The eighth article of the act of 1849, concerning the claim and delivery of personal property, is manifestly imperfect, and to remedy its defects and omissions resort has been had to the code of 1845. (*Shaffer v. Falduesch*, 16 Mo. 337; *Collins v. Hough*, 26 Mo. 149; *Berghoff v. Heckwolf*, 26 Mo. 511.) But the replevin act of 1845 was essentially different in spirit from the code of 1849 in the remedy provided for the recovery of specific property. The replevin act of 1845 did not allow a cross replevin, made no provision for the defendant's retaining the property when the plaintiff followed the prescribed course of proceeding. Nothing is said, therefore, in the code of 1845 about the defendant's securities, as no such case was contemplated. The ninth section of the eighth article of the act of 1849 is the only provision touching this subject, so far as the bond of defendant is concerned, and there is no authority in that section for a judgment against the securities, except in the mode pointed out in the section, and this was not pursued here.

The failure of the jury to assess the value of the slave in so many words, and of the court to give a judgment, either for a return of the slave, or for her value, are errors which could not, so far as we can see, injure the defendant; but

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the defendant's securities are not responsible, except in the mode pointed out by the statute, and no motion in arrest of judgment was necessary to save this point. The judgment of the court must therefore be reversed for this error.

A great number of instructions were given in this case, touching the title to the slave sued for—indeed all the instructions which were asked on both sides—and no substantial objection is made to them. The will of W. P. Flint, by which he undertook to dispose of the slave, was no evidence of his title, and was therefore rightly excluded.

Judgment reversed and case remanded. The other judges concur.

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CARTER, Plaintiff in Error, v. MILLS *et al.*, Defendants in Error.

1. In order that a third party, not an original party to a suit, may be permitted to come in and set up his claim to the subject matter in controversy or his defence, it is not required that he should be a *necessary* party.
2. Where a party seeks the specific enforcement of a contract to convey land, and a third person, not a party to such suit as originally instituted, who claims the same land by an alleged superior title under the person against whom such specific enforcement is sought, desires to be made a party, he may well be permitted to come in and defend; if a decree as between the original parties to the suit would affect his rights injuriously—as by casting a shadow on his title—he would have a *right* to be heard.
3. One M., residing in the year 1856 in the state of California, owned certain lots adjoining the city of St. Joseph, Missouri. He had in St. Joseph an agent authorized to sell said lots for a specific sum. An uncle of M., a surgeon in the United States army, stationed at Fort Columbus, New York harbor, was also made acquainted with his wish to dispose of said lots. An offer by one G. to purchase said lots was transmitted through said uncle to M. in California. M. thereupon executed a deed dated in California, October 6, 1856, conveying said lots to G., and forwarded the same by mail to the uncle at Fort Columbus, where it was received by him about December 1, 1856, and immediately handed over to Gibbs upon his paying the purchase money. In the mean time, the agent of M. at St. Joseph had, on the 20th of October, 1856, in good faith, entered into a written contract to sell said lots to one C. C., on the 29th of Nov'r, 1856, instituted a suit against M. for the specific enforcement of this contract. M., being a nonresident, was notified by publication, but made default. G., on his own motion, was

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admitted to defend, against the objection of the plaintiff. *Held*, that G. was, under the circumstances, properly admitted to defend; that having the legal title and a prior equity—the acceptance of the offer of G. being prior to the contract with C.—his title would prevail over the naked agreement to convey to C.

4. An order of publication against absent defendants does not operate as notice to purchasers until it is executed.

*Error to Buchanan Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.

*Loan*, for plaintiff in error.

I. The court should have overruled the motion filed by Gibbs to be made a party defendant in this suit. No authority has been shown to authorize such a proceeding. If he had the legal title, as he asserts, a judgment against Mills could not affect him. He had no standing in a court of equity. (*Gamble v. City of St. Louis*, 12 Mo. 617; *Taylor v. Ulrici*, 19 Mo. 89; *Drake v. Jones*, 19 Mo. 428; 17 Mo. 562.) If he had not the legal title, then he is not in a position to question the plaintiff's rights. This proceeding is not the way to settle the prior equity between Carter and Gibbs. (20 Mo. 222; 24 Mo. 87.) If the doctrine contended for be correct, then a final conveyance to a third person would always be sufficient to defeat an action for a specific performance of a contract for the sale of land, however fraudulently obtained or insufficient it may be as against the plaintiff. The argument is this. The plaintiff can not question the validity of Gibbs' deed, because the plaintiff has established no right against Mills, and he can establish no right against Mills because Gibbs' deed is a bar. Can this be law? Or is the plaintiff authorized to establish his right against Mills and then be permitted to question Gibbs' title? In such case Gibbs' deed, if he had one, is *prima facie* good against the world, and, if not set aside by Mills or his representatives, will hold the property. In such a case there can be no trust resulting in favor of the plaintiff, because it does not appear that Gibbs had knowledge of Carter's rights. If

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Gibbs' deed was fraudulent as against Mills, no trust would result in favor of the plaintiff, because in equity Mills as against Gibbs is entitled to have the deed cancelled. The motion to strike out Gibbs' answer should have been sustained.

II. The letter to Dr. Mills should have been excluded. A. J. Mills was an adverse party to the plaintiff. His co-defendant Gibbs could not call him as a witness; nor would his declarations be admissible. The exhibit filed with Sugwell's deposition, purporting to be a copy of the original deed from Mills to Gibbs, was improperly admitted in evidence. The declarations of law asked by plaintiff should have been given. Those given for defendant should have been refused.

*Hall*, for defendants in error.

I. Gibbs was properly made a party. If Gibbs' title is superior to Carter's, then he is interested in the suit adversely to plaintiff, because Carter, by obtaining a decree, would get a perfect title on record, and, by selling to an innocent purchaser for value, could defeat Gibbs' title. If Gibbs' title is inferior to Carter's, still Gibbs is interested in the suit, because in the case last supposed he and not Mills would be entitled to the purchase. (11 Wheat. 304; 2 Brock. 42; 16 Mo. 249; 3 Cod. R. 172.) Gibbs, having received his deed after the commencement of this suit, was properly made a partner under section 24 of article 11 of the practice act. Gibbs had an interest in the suit. (15 Mo. 640; Adams' Eq. 166; 2 Sug. Vend. 98.) Carter was not injured by making Gibbs a party. The court was thereby enabled to decide the whole controversy. The deed to Gibbs took effect from its date, October 6, 1856. Plaintiff did not contract until October 20, 1856. (4 Kent, 454; 2 Mass. 447; 9 Mass. 295; 15 Wend. 658; 13 Johns. 284; 1 N. H. 358; 4 Day, 66; 5 Ired. Eq. 304.) If it took effect from its delivery only, still it is good against Carter. Gibbs has the legal title; he acquired it without knowledge of Carter's equity; having paid the purchase money, his equity is at

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least equal to Carter's, and having the legal title his rights are superior to Carter's. The letter to Dr. Mills is sufficient of itself to defeat plaintiff's action. Gibbs' equity is superior, being prior in point of time. Carter, having paid no part of the purchase money, is to be taken as having contracted with notice of Gibbs' prior contract. (Paul v. Fulton, 25 Mo. 163.) The execution of the deed was sufficiently proved. (Clardy v. Richardson, 24 Mo. 296.) The question of *lis pendens* does not arise in this case. No notice until process is served or publication completed. (4 Bibb, 499; 9 Paige, 513; 15 Ala. 24; 2 Rand. 104; Adams' Eq. 154; 1 Sto. Eq. § 406.)

NAPTON, Judge, delivered the opinion of the court. -

Andrew J. Mills was the owner of ten acres of land, laid off into lots, adjoining the city of St. Joseph. He resided in California, but he had an agent named McClelland, in St. Joseph, who was authorized to sell these lots for one thousand dollars. His uncle, Dr. Madison Mills, a surgeon in the United States army, stationed, at the date of this transaction, at Fort Columbus, New York harbor, was also made acquainted with his wish to dispose of these St. Joseph lots, and a correspondence ensued between the uncle and nephew which resulted in a sale of the lots for \$700, to M. Gibbs, and a deed from A. J. Mills to Gibbs, dated in California on the 6th of October, 1856. This deed was forwarded by mail to Dr. Mills, at Fort Columbus, where it was received about the 1st of December, 1856, and immediately handed over to Gibbs upon his payment of the purchase money. Gibbs had the original deed forwarded by mail to the recorder of deeds at St. Joseph, to have the same placed on record, but it appears that the letter was never received by the clerk or recorder to whom it was directed.

Meanwhile, McClelland, as agent for Mills, on the 20th day of October, 1856, made a contract in writing, with the plaintiff, Carter, for the sale of these lots at the price of

\$1,000. This suit is brought against Mills to compel a specific execution of this contract, and to get a decree for the title in Carter upon his paying the one thousand dollars. Mills, being a nonresident, was notified by publication, but made default, and Gibbs moved to be admitted to defend and set up the facts as we have just stated them. This the plaintiff objected to, but the court allowed it, and the title, as between Gibbs and the plaintiff, was examined, and the result of the investigation was the establishment of Gibbs' title and the refusal of the court to decree a specific performance against Mills.

This permission of the court to let in Gibbs as defendant presents the main question in the case. The plaintiff insists that the proceeding is without precedent; that if Gibbs has the legal title, any decree which he may obtain against Mills will not affect it, and therefore Gibbs has no right to interplead; and if Gibbs' title depends upon his superior equity, this is not a proceeding in which it can be considered.

This objection to the proceedings of the court, coming from the quarter it does, certainly presents to us the appearance of a singular anxiety for self-sacrifice in order to preserve order and regularity in judicial proceedings. The plaintiff asks the interposition of the court to procure him a title, for which he offers to pay one thousand dollars, and brings the money into court, and yet he considers it entirely immaterial to his case whether this title shall be a good one or a worthless one. Gibbs proposes to have this question settled, and therefore applies to the court for leave to come in and defend. But the plaintiff objects, and says it matters not whether Gibbs has the title or not; that he asks no relief against him; that he is willing to take a decree against Mills alone, pay the thousand dollars, and take a worthless title.

To this dilemma the plaintiff's objections must inevitably lead, unless, indeed, some advantage is expected to be derived from a decree of the title in him in a subsequent controversy with Gibbs. The question, then, presents itself,

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will the court, on the hypothesis that Gibbs' title is valid and a decree would in nowise affect it, perform the vain and nugatory act of decreeing a title from Mills when he has already parted with it to Gibbs? Such a course can only tend to multiply suits and protract litigation. If, on the other hand, a decree would affect Gibbs' rights to the land in any way, it is clear that Gibbs has a right to be heard. If the title thus put on the record would have the effect of casting a shadow on Gibbs' title, this circumstance alone has furnished courts of equity with a considerable branch of their jurisdiction. The facts set up by the defendant Gibbs do not show an absolute title in him on the face of the conveyance, which facts *in pais* might not and could not overturn. On the contrary, the merits of the respective claims depend obviously upon the proper construction of the letter of Mills to his uncle enclosing the deed, and the other acts and circumstances attending the delivery of the deed.

It must be borne in mind that the plaintiff in this case does not ask any compensation in damages against Mills for a breach of his contract. He asks only for the title, for a decree of the title to the lots. If a court of equity, in such a proceeding, is satisfied, from the answer of the defendant, or from the interposition of a third person, who has the title, that the decree prayed for would be absolutely nugatory, will the court still proceed to perform a nugatory act? Why should the plaintiff insist on it, when it will be of no advantage to him?

It is not the law, that in order to admit a third party, not an original party to a suit, to come in and set up his claim or his defence, that he must be a *necessary* party—one without whom the suit could not regularly have progressed. In *Hopkins v. Page*, 1 Brock, 42, Judge Marshall observes: "All persons having distinct interests must be brought into court, but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not, I think, always necessary to bring both before the court. Thus,

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a trustee may sue, without naming the *cestui que trust* as a party; an executor or administrator may sue without naming legatees or distributees; and the obligee in a bond, where it is not by law assignable, may sue, or the equitable assignee may sue in his name, without being named himself as a party. This may, I think, be done in a court of equity as well as in a court of law. The person having the equitable interest, if the suit be not really brought for his benefit, *may insist on being made a party*, and the court will direct it; but I do not think the omission of persons in this situation any objection to the suit." The case now under consideration is not one of the cases put by the chief justice in illustration of his position, but the observation is cited to show that the rule of practice allows parties to be heard who might, if they saw proper, permit the case to progress without their interposition. Here, the owner of the title—for we assume for the purposes of this inquiry that Gibbs has acquired the title from Mills—voluntarily comes forward and asserts his title. Whether it is good against the plaintiff is the question he proposes and is willing to have tried. He was not a necessary party, and the case, so far as Carter and Mills are concerned, might have proceeded to a decree; but how can the plaintiff be possibly injured by settling the whole controversy at once? As Gibbs has come forward and explained his title to the lots which plaintiff asks a decree for, and Gibbs' title as well as the plaintiff's is decreed from the defendant Mills, must the court close its eyes to the fact and proceed to perform a mere vain ceremony, and one which must, upon any reasonable calculation of plaintiff's motives, lay the foundation for another suit? We fully appreciate the propriety and necessity of order and formality in judicial proceedings, and are aware that general rules for the conduct of suits—although they may in exceptionable cases lead to some inconvenience and expense—must not be abandoned. But we have not been satisfied that the course pursued in this case is a breach of these rules; on the contrary, it seems in accordance with the spirit of our practice act.

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We shall therefore proceed to consider the points upon which the merits of the case turned.

It is plain that Gibbs has the prior legal title, if the deed of Mills is to be construed as taking effect from its date, and this depends upon the circumstances attending the execution and delivery to Dr. Mills. We copy the letter from Mills to his uncle Dr. Mills enclosing the deed, which is dated Louisa county, California, 6th October, 1856: "I received your letter dated September 1st on the 4th inst., and Mr. Montgomery Gibbs' proposition to purchase ten lots in St. Joseph gardens, Missouri. My price has always been \$1,000, but they have been an expense rather than a profit, so I concluded to accept his offer. If seven hundred dollars is low for the property, I may do as well with it as the lots, and have it on hand where I can look to it. I send the deed for the lots, as I wish to dispose of what scattering property I have in different places, so as to get my little means together so that I can use them. I think it best even at a loss. Yours, &c., &c., A. J. Mills."

The court instructed the jury that "If the defendant Mills, in pursuance of an offer of defendant Gibbs, made and executed a deed for the land described in plaintiff's petition on the 6th October, 1856, and sent said deed by mail to Dr. Mills in New York, to be delivered to said defendant Gibbs, and that said deed was delivered to said Gibbs in December, 1856, and that Gibbs thereupon paid the purchase money, the plaintiff can not recover."

It is well settled that a delivery of a deed to a stranger for the use of the grantee is a good delivery, and where the deed is to be handed to the grantee upon his compliance with a condition, the deed still takes effect from its date when the condition is complied with and the deed is thereupon delivered. It would be different if the deed is delivered to a stranger subject to the future control of the grantor.

The case of Belden v. Carter, 4 Day, —, affords an illustration of the application of the rule. There the grantor said: "Take these deeds. If I never call for them, deliver

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over one to P., (defendant's wife,) and the other to Noble, after my death. If I call for them, deliver them up to me." The court said: "It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is, that it became the deed of the grantee presently; that W. held it as trustee for the use of the grantee; that the title became consummated in the grantee by the death of the grantor, and that the deed took effect by relation from the time of the first delivery."

✓ If this principle is a correct one, and we apply it to the facts of this case, it will be seen at once that on the 20th October, 1856, Mills' agent, McClelland, could make no contract affecting these lots, since his principal had previously parted with his title. But if the doctrine of relation, as stated in the case of Belden v. Carter, should be thought inapplicable, it is not perceived that the result would be different. There is no charge of want of good faith in this transaction on the part of either the principal, Mills, or his agent, McClelland. Each acted, no doubt, in ignorance of what the other was doing. If Mills had known of McClelland's contract to sell his lots for a thousand dollars, he of course would not have sold to Gibbs for seven hundred. The letter of Mills and the accompanying deed must undoubtedly be regarded as an acceptance of the offer of Gibbs made through Dr. Mills, and when the deed was received and the money paid, the legal title was then, at all events, in Gibbs, and the contract on which it was based was prior in time to that made with the plaintiff. Gibbs, then, had the legal title and a prior equity, which would surely prevail over a naked agreement to convey.

We do not see how the doctrine of *lis pendens* has any bearing on the case. The plaintiff's suit was commenced on the 29th November, 1856, previous to the reception of Mills' deed in New York, which was about the 1st of December. But there was no actual notice to Mills, and the notice by

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publication could not have been completed before the consummation of the negotiation between Mills and Gibbs. Neither Mills or Gibbs could have had notice, either actual or constructive. An order of publication against absent defendants does not operate as notice to purchasers until it has been executed. (Hayden v. Bucklin, 9 Paige, 513; Clevenger v. Hill, 4 Bibb, 499.)

The judgment of nonsuit is affirmed; Judge Ewing concurring.



DAVIS, Appellant, v. LAMB, Respondent.

1. A vendor of land has a lien thereon for the unpaid purchase money.

*Appeal from Grundy Circuit Court.*

The plaintiff sets forth in his petition that on the 24th of April, 1857, he entered into a contract with the defendant to sell him a certain tract of land for one hundred and twenty dollars; that the defendant paid twenty-five dollars, and delivered to plaintiff his promissory note for ninety-five dollars, the balance of the purchase money; that at the time of the sale he gave defendant a title bond for said land; that plaintiff has not made a deed to defendant for said land; that the note is still due and unpaid. He asks judgment for the amount of the note, and that the land be sold to pay the same.

*Tindal*, for appellant.

- I. The court erred in refusing to enforce the lien.

NAPTON, Judge, delivered the opinion of the court.

This suit was brought by the vendor of a tract of land against the vendee on a note given for the purchase money; and the object was to procure a judgment on the note, and enforce the lien on the land sold. No title had been made

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to the vendee. A judgment by default was had, and at an ensuing term a final judgment on the note, but the court refused to subject the land to its payment.

We have not been able to discover upon what grounds the court refused to enforce the lien. The appellee has not appeared here, and we are not advised of the points upon which the case turned in the circuit court; but if there were any good reasons for denying the enforcement of the vendor's lien in this case, they have escaped our observation in examining the record.

Judgment reversed and case remanded. Judge Ewing concurs. Judge Scott absent.



REED, Defendant in Error, v. PRICE *et al.*, Plaintiffs in Error.

1. An action to recover damages for trespass to land can be maintained upon possession alone. Where the possession of the plaintiff is admitted, the defendant may put in issue his possessory right, but to sustain such a defence he must show a superior right in himself or in another under whom he claims. If the defendant be a mere intruder he can not, the plaintiff's possession being admitted or proven, show a want of title in the plaintiff.
2. Where the plaintiff, in an action for trespass to land, claims in his petition ownership and possession, and the possession is admitted or proven, the defendant, if he be a mere intruder, can not be permitted to introduce evidence to show a want of title in the plaintiff in mitigation of damages.

*Error to Cole Circuit Court.*

This was an action against Thomas L. Price and others to recover damages for an alleged wrongful entry upon a certain lot in the city of Jefferson, "of which the plaintiff then was and still is in possession and owner," and the building of an embankment thereon. The plaintiff alleges special damages. The embankment was built in the construction of the Pacific railroad. The defendants, by their answer, put in issue the alleged ownership of plaintiff, but did not deny the possession. At the trial plaintiff proved his possession, and introduced

evidence tending to prove that the damages to the lot were as alleged in the petition. The defendants introduced evidence with a view to show that the trespass complained of was no injury to the lot, but a benefit, the embankment on it being part of the Pacific railroad. This evidence showed no special benefit to said lot other than the general enhancement of value resulting to all real estate along the line of the road from the construction of the road. This evidence was admitted against the objection of plaintiff. The defendants then offered to prove that plaintiff, at the time of the commission of the alleged trespass, had no title whatever to said lot, had none before, and none since, and has been and is a trespasser upon the same, the title being in one David B. North, in whose favor an action of ejectment was pending in the Cole circuit court, the trial term of which was the term at which the trial in this cause was proceeding. This evidence was excluded.

The court, at the instance of the plaintiff, instructed the jury as follows: "1. It is admitted that the defendants, without leave, placed the embankment mentioned in the petition on the lot mentioned therein. 2. It is admitted that the plaintiff was, at the time of the commission of the alleged [trespass] and at the time of the commencement of this suit, in possession of said lot."

The court gave the following instruction at the instance of the defendants: "1. Damages are given as compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendants. They should be precisely commensurate with the injury, neither more nor less. The jury ought, therefore, in assessing the damages in this case, to give no more than will compensate the plaintiff for the injury he has received. If he has received no injury in fact, they ought to give nominal damages."

The following instructions asked by the defendants were refused: "2. In ascertaining the extent of the injury in fact, the jury ought to look to all the circumstances sur-

rounding the property presented in the evidence and affecting the extent of the injury. 3. The plaintiff, having proved no title in this case but the mere possession, can recover only for the injury to the possession, if any, between the time of the commission of the trespass and the commencement of this action; that is, from the month of May, 1855, when the injury is alleged to have been committed, to the 14th of April, when the action was commenced."

The jury found for plaintiff.

*Gardenhire*, for plaintiff in error.

I. Evidence that the plaintiff had no title and was himself a trespasser, ought to have been admitted. To maintain trespass there must be a possession, and a right to that possession. (9 Cow. 39; 1 N. & M. 356; 4 Yates, 218; 11 Conn. 60; 6 Rand. 556; 2 Brown, 106; 4 Watts, 377; 1 Johns. 511; 4 Pick. 305; 4 Bibb, 218; 2 Hill, S. C., 466; 1 Har. & J. 295; 8 Mass. 411; 6 Mo. 583.) It must be a *lawful* possession. The courts will not assist one trespasser against another. Possession is *prima facie* sufficient. It is presumed to be lawful and consistent with the right of the owner, but it may be shown in defence to be otherwise. If not, wrong creates right; the trespasser having no right to the property injured, yet has a right to damages for an injury done to it. And more, the owner has a right to the same damages, and the recovery by the trespasser can not bar his recovery. Under such a rule the last trespasser would be liable to double damages. This can not be so where the possession of the plaintiff is lawful, and consistent with the right of the owner. In such cases, the trespasser is liable to the party in possession for the injury to the possession, and to the owner for the injury to his reversionary interest.

II. But if the evidence was not admissible in defence, it certainly was in mitigation of damages. If the law will assist one trespasser against another, it certainly will not give him damages beyond the injury to his wrongful posses-

sion. Possession is all he has to be injured, and to give him damages beyond this would be to offer a premium for trespass and pay a bonus for wrong. It would place a trespasser in a better condition than a tenant in lawful possession. While the latter is only permitted to recover for the injury to his possession, the former would be permitted to recover for the injury to the whole estate, and for no better reason than that he had wrongfully put himself in possession of it. The third instruction ought to have been given. The damages ought to have been confined to the injury to the possession.

*Parsons*, for defendant in error.

I. It was admitted by the pleadings that the plaintiff was in the possession of the premises at the time of the commission of the injuries complained of. He had therefore the right to maintain his action for such injuries. (1 Chitty's Pl. 176.) The appellants in this case set up no license to enter from any person claiming an outstanding title; they are therefore to be treated as strangers; hence there was no error committed by the court in refusing to permit them to show an outstanding title in another party; in fact no such defence was set up in their answer. For the same reason the appellants' third instruction was properly refused. The defendant's second instruction was only calculated to mislead the jury, this court having heretofore decided that direct and peculiar benefits only can be taken into consideration in the assessment of damages done to the landholder in the building of roads. (*Newby v. Platte County*, 25 Mo. 276.) The instruction directing the jury to look to all the circumstances surrounding the property could have meant nothing more than to authorize the jury to consider the fact that the railroad was constructed near by it. The first instruction asked by the appellants, and which was given by the court, put the question of damages fairly to the jury, and a verdict having been returned for much less amount than was claimed in the petition, it ought not to be disturbed.

EWING, Judge, delivered the opinion of the court.

The possession of the plaintiff being conceded, and the defendant claiming no title to the premises or license from the owner to enter, the question is whether evidence of want of title in the plaintiff was admissible.

The law has been too long and too well settled to render it necessary to cite authorities in support of the position that possession is sufficient to maintain an action of trespass. In this action the defendant may dispute the plaintiffs' possessory right, by showing that the title and possessory right are vested in himself or another, under whom he claims or whose authority he has. But if the plaintiff prove possession merely, that will suffice, if the defendant can not show a superior right in himself or another under whom he can justify. It is true the plaintiff must prove such a lawful possession as the defendant had no right to disturb, but any possession is a legal possession as against a wrongdoer. (*Graham v. Peak*, 1 East, 246; *Lambert v. Strakin*, Willes, 219; *Cottoirs v. Cowper*, 4 Taunt. 546; 3 Metc. 242; *First Parish in Shrewsbury v. Smith*, 14 Pick. 303.) In the case last cited the general principle and reasons upon which the doctrine rests is well stated by Chief Justice Shaw, in delivering the opinion of the court. He says: "There are many cases where acts have been done intended to constitute a good and valid title, where grants have been made and titles transferred, but where, through negligence, ignorance or mistake—especially where corporations, public bodies and official agents are concerned—such titles can not be legally proved. Upon a close investigation a flaw in the title would be discovered. If a lawful owner, in whom the legal title remains, chooses to interfere and set up his legal claims, the law, in consistency with its own rules in regard to the transmission of title, may be compelled to admit his claim. But if such owner, upon considerations of propriety, equity and conscience, chooses to acquiesce and permit the party in possession to retain that possession notwithstanding any defect of

title, by what rule of law, of equity, or sound policy, can a mere stranger be allowed to interfere and by his own act violate the actual and peaceable possession of another, and thereby compel him to disclose a title, in the validity or invalidity of which such stranger has no interest?"

But it is insisted, in the second place, that if the evidence was not admissible *in defence*, it should have been received in mitigation of damages. The instruction asked on this point and refused is, in substance, that the plaintiff, having proved no title but the mere possession, can recover only for the injury to the possession, if any, between the time of the commission of the trespass and the commencement of the action. It is not perceived upon what principle the evidence would be admissible for one of these purposes and incompetent for the other. Such an instruction, and the rule of damages it prescribes, would have been entirely consistent with the evidence which was excluded, but was clearly inadmissible in any other view of the question. If, therefore, the evidence was inadmissible and properly excluded, the instruction was erroneous. The error of the instruction consists in assuming the right of the plaintiff to have been a *mere possessory* one, and in excluding the idea of title. If the plaintiff had been a mere tenant, then the rule of damages laid down in the instruction would have been proper, because, as the interest was only a possessory one, the injury could not go beyond that. But such a rule is wholly inapplicable to this case. Because the plaintiff proved a mere possession, it did not follow that the damages should have been restricted to an injury to the possession. The question of title was not necessarily in issue; for possession was sufficient to maintain the action; and the plaintiff's possession having been admitted, and the question of title not having been put in issue by any form of defence that was admissible, the instruction was wrong in assuming that, because possession only was proved, there was no title in the plaintiff, and therefore damages could be given only for an injury to the possession. The plaintiff had not only the possession,

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but *prima facie* title also; and this presumption of title arising from possession not having been rebutted by the defendant, how could he say that he was liable to respond in damages for an injury to the possession merely? The case, therefore, stands upon the same ground in respect to the measure of damages as any case where all the elements of a perfect title—namely, possession, right of possession, and the right of property—concur in a party plaintiff suing in trespass.

The instructions given laid down the proper rule with respect to damages.

The judgment will be affirmed. Judge Scott did not sit. Judge Napton dissents.

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BLEDSON, Plaintiff in Error, v. GAMES *et al.*, Defendants  
in Error.

1. The vendor of an equitable title has a lien for the unpaid purchase money to the same extent as the vendor of the legal title.

*Error to Callaway Circuit Court.*

This was an action by the plaintiff Bledsoe against John Games, Gideon Games, and Jonathan C. Duvall. The petition in substance is as follows: Plaintiff states that on October 3, 1858, and long prior thereto, he was the owner in equity of a certain tract of land; that the defendant Gideon Games holds the legal title in trust for the plaintiff; that Gideon Games, having the legal title formerly, sold said land to his son John Games and Craig Games jointly; that Craig sold his undivided half thereof to John Games; that said Gideon then executed a title to said John Games his son; that said John Games being the equitable owner, and being possessed, transferred by written agreement, dated December 26, 1856, his said equitable title to the plaintiff Bledsoe for \$2,000; that having paid the purchase money due upon said

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agreement, he, Bledsoe, became the equitable owner of said land; that afterwards he, Bledsoe, contracted and agreed to sell said land to John Games for the sum of \$2,400, for which said sum he agreed to take in payment from said John Games a note for \$1,000 that had been given to said John Games by plaintiff, and for the balance of said purchase money he took the note of said John Games for \$1,400, dated October 3, 1857, and payable on or before June 1, 1858; that said note is due and remains unpaid; that said Gideon Games, being possessed of the legal title and being trustee for the plaintiff and having full notice of the lien of the plaintiff for the balance of the purchase money, sold the said tract to Jonathan Duvall for \$2,800; that said Duvall purchased without notice of plaintiff's lien; that there is a balance of purchase money remaining due and unpaid by said Duvall amounting to \$1,400; that \$1,400 has been paid by said Duvall to said Gideon Games. Plaintiff asks judgment against said John Games for \$1,400, the amount of his note, with interest. He also asks that the purchase money still remaining unpaid by said Duvall and to Gideon Games be arrested in the hands of said Duvall and applied in payment of the amount due plaintiff on the note from John Games; that Gideon Games be restrained from collecting the sum due from Duvall to the prejudice of plaintiff; that Gideon Games be compelled to account for sums received from Duvall. Plaintiff also prays that after the payment of said note from John Games the title to the land, as against said John Games and Gideon Games, be decreed to vest in said Duvall.

The court sustained a demurrer to this petition.

*Jones & Hayden*, for plaintiff in error.

I. The plaintiff had invested in the land an interest amounting to the sum of two thousand dollars, being the price paid by him to John Games. As against John Games, to whom he afterwards sold the land, nothing could divest that interest except the payment of the money; and so long

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as the purchase money remained unpaid the land was in equity a security therefor. Before he could make this security available, Gideon Games, who held the legal title in trust constructively for John Games and his assignee, Willis Bledsoe, in violation of that trust, sells to Duvall, receives part of the money, and pockets it, and is seeking to obtain the balance. Gideon Games had no interest in the land; he had sold it. If the purchase money was still due him, that would be a fact to be set up by him. He could not foreclose such an equity by a private sale to Duvall, by which the rights of Bledsoe would be compromised. Bledsoe had a subsequent lien and a consequent right to redeem. The petition does not show that Gideon Games had any interest in the land; he simply held the title in trust for the equitable owner. The balance of the money remaining unpaid can be arrested and applied to the satisfaction of Bledsoe's prior encumbrance and equitable lien. Bledsoe was the owner in equity before his sale to John Games, and had a lien for his money after said sale, and might have enforced a conveyance from Gideon Games, who simply held the legal title. He may proceed against the balance of the purchase money in the hands of Duvall, and for such as has been paid over to Gideon Games. (2 Sto. Eq. § 1232, 1255.)

*Gardenhire*, for defendants in error.

I. The judgment is for the right party. Gideon Games and Duvall are improper parties. They are not necessary to a complete determination of the action. The only action maintainable is against John Games for the amount of the note. Bledsoe never having had the legal title, had no lien for the unpaid purchase money. Gideon Games, holding the legal title, had a lien upon the land against John Games and Bledsoe. (10 Mo. 398; 2 Sto. Eq. § 1217; *Bailey v. Greenleaf*, 7 Wheat. 50.) At least the lien of Bledsoe was subordinate to that of Gideon Games. Before the lien on the equitable interest can be made available in a way to affect the original vendor, it must be shown that his lien has been extinguished.

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This the petition does not show. The action against Gideon Games and Duvall is based upon an implied trust. There is no pretence that a trust was actually intended. Duvall purchased from Gideon Games.

SCOTT, Judge, delivered the opinion of the court.

This case stands upon a demurrer, and we see no good reason why the defendants should not have answered the plaintiff's petition. If John Games has not paid Gideon Games the purchase money he owed him for the land, neither he, nor his assignee and vendor, the plaintiff, will be entitled to a decree against him until that is done, as he can not be entitled to more than what remains of the value of the land after Gideon Games is satisfied his purchase money.

We do not see the force of the objection, that the petition does not aver that Gideon Games has not been paid his money. The plaintiff Bledsoe may not know how the facts are between John and Gideon Games. If Bledsoe had declared his ignorance of the fact of the payment of the purchase money to Gideon Games, would he have been deprived of all relief? Bledsoe is entitled to know whether the original purchase money has been paid to Gideon Games, and if it has, then Gideon was guilty of a fraud in selling to Duvall; and if the purchase money has not been paid by Duvall, it may be stopped in his hands for that purpose.

The lien for the unpaid purchase money of real estate is recognized to the same extent, in case of a sale of an equitable title, as of a legal one. (1 White's Eq. Cas. 271.) The case of Bailey v. Greenleaf, 7 Wheat. 41, cited by defendant, is not analogous to the present. In that case the court says there was an actual conveyance of the legal estate. (Id. 57.)

Judgment reversed and remanded. The other judges concur.

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Buckley v. Briggs.

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BUCKLEY, Defendant in Error, v. BRIGGS, Plaintiff in Error.

1. The fact that a corporation has a seal does not prevent its agents from binding it by contracts not under seal.
2. It does not follow, because a corporation is by its charter prohibited from dealing in commercial paper, that it may not lawfully receive and sell notes given for the sale of its lands.

*Error to Holt Circuit Court.*

This was an action to recover a balance due on two negotiable promissory notes executed by the defendant in favor of "Henry W. Peter, treasurer of the White Cloud City Company, for the use and benefit of said company." These notes, it is alleged in the petition, were assigned to the plaintiff by O. Bailey as president of said White Cloud City Company, and H. W. Peter as treasurer thereof. The defendant in his answer admitted the execution of the notes sued on, but denies that they were assigned to plaintiff, and set up that the payee of said notes is a foreign corporation, whose chief office is without this state; that by its charter said company is specifically restricted from dealing in commercial paper; that said corporation has and uses a common seal; that thereby said payee has failed to assign said notes; that the said Peter and Bailey as treasurer and president of said corporation had no authority or power to sell or transfer said notes. The defendant further sets up that said notes were executed in consideration of certain lots in Kansas territory; that said lots were purchased at a public sale made by said corporation; that the defendant is informed and believes and charges the fact to be that at said public sale the corporators of said body politic, for the purposes of inflating the prices of the lots sold, agreed among themselves that they should bid for what lots they might choose, and if dissatisfied after the sale they might surrender their said purchases, but said privileges were not extended to the bidders generally; that thereby defendant, on account of said fraud, was induced to promise greatly more for said lots than they were worth;

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that defendant knew nothing of the said combination until after the commencement of this suit. Defendant sets up that he has made valuable improvements; offers to rescind said contract on being paid for improvements; prays that said White Cloud City Company be made a party plaintiff; that he may be allowed the value of his improvements as a set-off; that the sale be rescinded.

This answer was stricken out on motion of plaintiff.

*Ryland & Son*, for plaintiff in error.

I. The court improperly struck out defendant's answer. It set up fraud and fraudulent combination in puffing and in running up the lots by false bidders, and that defendant was defrauded in being induced to bid as much as he did and in giving his notes for the purchase money.

*Vories & Vories*, for defendant in error.

I. The court properly struck out the answer. It sets up no defence to the action. There is no denial of the assignment, but merely a denial that the notes were assigned by the seal of the corporation, or that they had power to make a legal assignment. The note was executed to Peters. The allegations with respect to fraud constitute no defence.

NAPTON, Judge, delivered the opinion of the court.

We have been somewhat at a loss to know what construction ought to be put upon the answer, which in this case was stricken out upon the plaintiff's motion.

If the answer could be understood as a simple denial of the assignment of the notes sued on, either because such assignment was never in fact made, or if made in fact was void in law, the defence ought not to have been disregarded. But the pleading is very obscure. It denies the assignment, but proceeds to show the reasons on which the denial is founded; and if the order of the answer is inverted and the reasons are put in front, it then stands as a series of allegations, from which a conclusion of the invalidity of the assign-

ment is drawn, and these allegations will not support the conclusion.

It is alleged that the payee of the note is a foreign corporation; that said corporation has by its charter no power to deal in commercial paper; that the corporation has and used a seal, and that the assignments were not under seal; and that "said Peter and Bailey, as treasurer and president of said corporation, had no power to sell or transfer said notes."

The fact that a corporation has a seal, does not prevent its agents from making valid contracts, without the formality of a seal.

If it be true, as alleged, that the charter prohibits the corporation from dealing in commercial paper, that would hardly be construed to extend to receiving and selling notes given for the sale of its lands; which we infer was the principal object of its creation.

The first allegation that the payee of the note was a foreign corporation, and the last, that H. W. Peter (who was the payee) as treasurer, and Bailey as president, had no power to transfer the title to the note, are contradictory to each other; but overlooking this, and treating this branch of the defence as intended to assert that, by reason of a provision in the charter which prohibited the company from dealing in commercial paper, [the president] and the treasurer had no right to assign the notes, it is the assertion of a legal conclusion which does not necessarily follow the premises. The language of the charter is not given, nor is the charter made any part of the answer.

The second defence set up in the answer is, that the corporators, previous to the public auction of the lots for the purchase money of which the notes sued on were given, had an understanding or agreement among themselves that they would be allowed to bid off any of the lots and afterwards take them or not at their option; that this arrangement had the effect of inflating the prices of the lots, and that the defendant, in consequence, gave a great deal more for them than they were worth. We do not see how this consequence

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follows. There is no averment that any of the corporators did bid at the sales; and it is difficult to see how an agreement never carried out could have had any influence on the bidders.

The last defence urged in the answer is a proposition to rescind the contract upon condition that the defendant is paid for his improvements.

Where a party intends to defend a suit upon its merits, the addition of defences manifestly untenable has the effect of creating doubts as to his real object, and he ought not to complain that his defence is subjected to a more rigid scrutiny than if stated plainly and simply and singly.

Judge Ewing concurring, the judgment of the circuit court is affirmed. Judge Scott absent.

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GRANT, Defendant in Error, v. KIDWELL, Plaintiff in Error.

1. Where the payee of a negotiable promissory note endorses the same before maturity, a payment made to him before his endorsement will not extinguish the debt so far as the endorsee is concerned, unless the latter had notice of the payment at the time of such endorsement.
2. An antecedent liability incurred by the endorsee of a negotiable promissory note, assigned before maturity, as surety for the payee and endorser, is a sufficient consideration to support the title of such endorsee; the endorsee, however, in such case, is a holder for value, in the sense that will entitle him to recover, against the maker of the note, irrespective of the equities between such maker and the payee, only to the extent of the liability incurred by him as surety for the payee.

*Error to Callaway Circuit Court.*

This was an action by Samuel Grant against Washington R. Kidwell on a negotiable promissory note for \$1,054.04, dated September 27, 1858, and payable six months from date, of which said Kidwell was the maker and one George Yates the payee. The petition alleges an assignment of said note by endorsement by said Yates to plaintiff on the — day of March, 1859.

The defendant in his answer admitted the assignment of

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said note by Yates on the 29th of March, 1859. He further set up that said assignment was not for value; that at various times previous to said 29th of March, he made payments on said note, (which are set forth specifically,) amounting in the aggregate to \$653.50, which he claims should be deducted from the amount due on said note. He also set up that Yates assigned and delivered said note to plaintiff as security against loss by plaintiff by reason of the latter being security for said Yates on a note for \$699.44, dated January 3, 1859, to one John B. Gregory, payable one day after date, with interest at ten per cent. per annum; that plaintiff holds the note sued on in trust for the alleged purpose, and is affected with notice of the payments above referred to made by defendant; that said assignment was made for no other purpose than by way of security against the liability aforesaid; that Yates is hopelessly insolvent. The defendant then proceeds to set up "as a counter-claim" expenditures made by him at the instance and request of Yates subsequent to the assignment of the note sued on. He prays that Yates and Gregory be made parties.

The court, on motion of plaintiff, struck out all of said answer except that admitting the alleged endorsement of the note by Yates to plaintiff. The court found for plaintiff and gave judgment for \$1,154.08 and costs.

*Hardin*, for plaintiff in error.

I. The court committed error in sustaining the motion to strike out the answer. Grant ought not under any circumstances to recover of Kidwell more than the amount of the note held by Gregory on him. Were he to recover the surplus he would be indebted to that extent to Yates. Why coerce from Kidwell this surplus? Grant obtained the note without value, and holds it in trust for a particular purpose. He is not entitled to recover against Kidwell more than enough to save himself harmless against his obligations to Gregory. Both Gregory and Yates should be made parties. (19 Mo. 63; 21 Mo. 156.)

*Hayden & Hockaday*, for defendant in error.

I. The note being a negotiable note and transferred before its maturity was not subject to any equities between the original parties in the hands of a *bona fide* holder for a valuable consideration without notice. The note was transferred for value. The consideration was Grant's suretyship for Yates. (Sto. on Bills, § 183; 5 Barr, 160; 9 Verm. 213.) The equities and offsets of Kidwell are of no avail. But assuming that the previous equities alleged as payments could be deducted from the note, there can be no pretence that after Grant obtained the transfer of the note Kidwell could, by subsequent transactions with Yates, impair the value of the security by creating offsets thereto. The answer does not offer to pay the balance of the note after the deduction of the equities accruing before the transfer of the note. Yates and Gregory are not necessary parties to the suit.

NAPTON, Judge, delivered the opinion of the court.

There is no doubt that a *bona fide* endorsee of a negotiable note can not be affected by any dealings between the original parties of which he had no notice. Therefore, where a negotiable note is endorsed before it is due, a payment made to the endorser before his endorsement will not be an extinguishment of the debt so far as the endorsee is concerned, unless he has notice of the payment at the time he gets the title to the note. (Story on Bills, § 417; Chitty on Bills, Ch. 6; *Prior v. Jacocks*, 1 John. Cas. 169.)

Of course this principle will apply *a fortiori* to payments made after the endorsement.

Grant's liability, as security for Yates, the payee and endorser of the note, was a sufficient consideration to support his title as evidence. (Story on Bills, § 183.) But a consideration may be entirely sufficient to support the transfer at the time, and yet there may be a subsequent failure of it in whole or in part. If Yates had paid off the note on

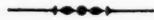
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which Grant became his security, the consideration for the endorsement would have failed; and if it had been only partially paid, the payment would have been to that extent an extinguishment of the claim upon Kidwell. The plaintiff Grant is a *bona fide* purchaser for a valuable consideration as far as it goes, but as he took the note now sued on to secure himself against a liability incurred for the endorser, Yates, whenever that liability is extinguished, he is no longer a purchaser for value. As the note sued on in this case was for \$1,054.94, and the note upon which the plaintiff was security was only \$699.44, we do not see why the defendant should be compelled to pay the surplus, for which there was no consideration whatever. Indemnity is the only basis of the transfer, and when that is accomplished the plaintiff stands as a purchaser without consideration.

The judgment is reversed and the cause remanded. The other judges concur.



ADAMS, Plaintiff in Error, v. COWHERD *et al.*, Defendants in Error.

1. Where the vendor of land, who has given a title bond only conditioned for the execution of a deed upon the payment of the purchase money, and who has not executed a deed of conveyance to the purchaser, assigns a note given for the purchase money to another, the equitable lien of the vendor will pass to the assignee and he may enforce the payment of the note against the land specifically.
2. Where the vendor gives merely a bond for the conveyance on the payment of the purchase money, and the vendee sells to another, such purchaser will take subject to the rights of the vendor, without regard to the question whether he had actual notice or not of the vendor's lien.

*Error to Saline Circuit Court.*

The facts of this case, in brief, are as follows: James M. Taylor sold certain tracts of land to George R. Cowherd, giving him, said Cowherd, a bond conditioned for the conveyance of said land to said Cowherd upon the payment of

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the purchase money. Cowherd gave his negotiable promissory notes to Taylor for the instalments to be paid. One of these notes was assigned by Taylor to the plaintiff Andrew Adams. Another note was assigned to the defendant George W. Nelson. Cowherd sold said land to one Hancock W. Davis, a defendant in this suit, who set up in his answer that he purchased *bona fide* without notice of any alleged lien on said land. Plaintiff seeks in this action a recovery on said note and the enforcement of a lien on the lands as against Davis. At the trial by the court, without a jury, the court, at the instance of defendant Davis, declared the law "to be that the plaintiff, as assignee, has no right to enforce the vendor's lien in this case." The court refused to declare, as requested by the plaintiff, that "by the transfer of the note to the plaintiff, he, as assignee, has the right to enforce the vendor's lien for its payment."

This constitutes the action of the court complained of.

*Adams*, for plaintiff in error.

1. The assignment of the note, whether the deed has been made or not, carries with it as an incident the right to enforce the vendor's lien for its payment. (1 Lea. Cas. in Eq. p. 274; *Graham v. McCampbell*, Meigs, 52; 2 Yerg. 84; *Tanner v. Hicks*, 4 Smedes & M. 294; 5 Humph. 489; 2 Mo. 179; 7 Mo. 466; 9 Mo. 277; 10 Mo. 398; 23 Mo. 447; 19 Mo. 425; 4 Litt. 289, 317; 5 Mon. 287; 3 J. J. Marsh. 45; 2 Dana, 99; 2 Burr. 969; 9 Ves. 411; 1 Johns. 580; 4 Russ. 336; 2 Verm. 84; 3 B. Monr. 452, 50; 2 Sto. Eq. § 1227; 1 Hill on Mort. 482; 9 Barr, 89.) The assignee might obtain a judgment *in personam* against the vendee, but if the vendee had nothing but the land, of what avail would the judgment be? The land could not be sold under the judgment. (10 Mo. 398; *Lumley v. Robinson*, 26 Mo. 364.) The only remedy in such case is a direct proceeding against the land itself to enforce the vendor's lien. No question can arise in this case about a waiver of the lien. No deed was given; only a title bond. (23 Mo. 447.)

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*Ryland & Son*, for defendants in error.

I. The taking of a negotiable promissory note, with the names of endorsers other than those of grantor and purchaser, is in law a waiver of the vendor's lien. (1 Amb. 724; 6 Ves. 752; 2 Verm. 281; 2 Humph. 248; 3 Ala. 302; 1 Gilm. 498; 5 Mun. 297; 1 Hard. 48; Yelv. 67; 21 Verm. 277.) The assignee of a note given for the payment of the purchase money has no vendor's lien, and acquires by his assignment no such lien. (1 Ohio, 318; 2 Ohio, 383; 14 Ohio, 22; 14 Ohio, 437; 3 Yerg. 27; 5 Yerg. 205; 7 Yerg. 9; 2 Dev. & Batt. Eq. 390; 1 Paige, 502; 6 How., Miss., 362; 1 Lea. Cas. Eq. 274; 3 Barb. 272; Freeman, Ch. 574.) In this case there was no note of the defendant Davis assigned to plaintiff. Plaintiff has no demand against Davis. The court properly declared the law. (29 Mo. 28.) The vendor's lien is not attached to a note for the purchase money, nor does it follow such note wherever it may go. The title to the assigned note is legal. There is no equity necessary to his title. (1 Mason, 24; 6 How., Miss., 362; 1 Bland, Ch. 524.) The lien is only implied and depends on circumstances. (5 Mon. 300.) It can not be enforced by a third party as assignee. It is unassignable. (3 Atk. 273; 1 Mass. 190; Sugd. on Vend. 63; 3 Young & Jar. 264.) The note is not the note of Davis. If the assignor should be compelled to pay the note, he may enforce the original vendor's lien. (7 Gill & Jo. 120; 1 Bland, Ch. 519; 2 Rose Cas. in Ch. 79; 3 Barb. 272.) The assignment of a note will carry with it the benefit of a mortgage, but not of a vendor's lien.

Scott, Judge, delivered the opinion of the court.

The application of the doctrine in relation to a vendor's lien for the unpaid purchase money may arise where the vendor makes an absolute deed which conveys away his legal title to the vendee, and also where the legal title is retained by the vendor, he only giving a title bond to convey when the purchase money is paid. The want of attention to this dif-

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ference, among the cases in which the right of a vendor to a lien for his unpaid purchase money has been involved, causes much embarrassment in the examination of this subject. It is obvious that the vendor, who retains his legal title and merely gives a bond to convey, is in a very different situation, in regard to the land he has sold, than he who has made an absolute conveyance conveying away the legal title. Where the vendor retains the legal title, the transaction on its face shows that he intends to hold such title as a security. It is just the same as if the vendor had conveyed the land, and afterwards taken a reconveyance by way of mortgage to secure the payment of the purchase money. In such cases the question of a want of notice of the equity of the original vendor can not arise, for he who purchases from one whose only title is a bond to convey may easily know the equitable rights of the original vendor, or he is guilty of such gross negligence as is evidence of a fraud. (*Anthony v. Smith*, 9 Hum. 511; *Graham v. McCampbell*, Meigs, 52.)

The doctrine in those states in which it is admitted to be law that the assignee of a note given for the purchase money does not acquire by such assignment the lien which the vendor himself had, has no application in cases where the vendor retains the legal title. It is only applicable where the vendor makes a full conveyance which passes away absolutely his legal title. This seems to be well settled law. (Lead. Cas. in Eq. 274, 275.)

This suit is not to subject Davis to the payment of the note. He is not a party to it, and can not be sued upon it. The action is to subject the land to the debt evidenced by the note; and as Davis acquired the land with a knowledge of the equitable rights of the vendor, he was properly made a party to it.

We do not see the force of the objection, that the plaintiff failed to have the note protested, and thereby lost his recourse against his endorser. But if the endorser is discharged, is not Cowherd, the maker, still liable? As Cowherd was the real purchaser of the land, and gave the note

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for the purchase money, if the plaintiff has lost his recourse, as is alleged, against some of the parties to it, how does that discharge the debt as to Cowherd? If the plaintiff had sued the endorsers, and recovered the debt, they would have fallen back on Cowherd; and he being the purchaser of the land, it would, in his hands or the hands of the assignee, have been liable for the purchase money.

Reversed and remanded. The other judges concur.

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**MCLAURINE *et al.*, Defendants in Error, v. MONROE'S ADMINISTRATORS, Plaintiffs in Error.**

1. A decree rendered in a sister state without due notice to the defendant is not binding upon him in this state, nor can it be evidence against him for any purpose as a decree. A general objection to the admission of such a decree as evidence is sufficient.
2. *Quere*, whether the doctrine of *lis pendens* is applicable to movable personal property.
3. Where there is a right of action against several, a mere judgment against one without satisfaction is no discharge of the others.
4. One who purchases property from another, knowing that the vendor has no right to the same and that another claims it, may, in equity, be treated as a trustee for the true owner. The owner may also maintain an action at law in the nature of an action of trespass.
5. One A. by deed conveyed to the children of his brother a female slave with her increase; the deed provided that the property conveyed should remain with the wife of said brother for the use and support of herself and said children during her life, or so long as she might "remain his widow" after his death. The deed also further provided that should she have any other children while the wife of said brother, they should be entitled to a share of the property with the children living at the date of the deed; at the death of said wife equal division to be made among the said children. *Held*, that this deed conferred no such interest on the wife as was subject to execution; that the legal title to the slaves was not in her.

*Error to Morgan Circuit Court.*

This was a bill in chancery filed in 1849 before the new code of practice went into effect. In the year 1825 Madison McLaurine, who lived in Tennessee, executed a deed by which, in consideration of love and affection for the heirs

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and children of his brother William McLaurine, he conveyed "unto the said children and legal heirs of the said William McLaurine" a negro woman named Nancy and her child Sophia, also household and kitchen furniture, "to have and to hold unto the children and legal heirs of the said William McLaurine in fee simple forever." The grantor agreed to warrant and defend said property: "Nevertheless, with this express condition, that the aforesaid property, and every part and parcel thereof, is to remain with the wife of the said William McLaurine for the use and support of herself and the aforesaid children and heirs of William McLaurine during her life, or so long as she may remain the widow of the said McLaurine after his death." The deed goes on to provide that should said wife have any other children born thereafter while she should remain the wife of said William McLaurine, they should share equally with those then living; that at the death of said wife, "and not until then, shall an equal division take place amongst the children and legal heirs of said McLaurine."

The complainants in the present suit are the said William McLaurine and Nancy his wife, and their children, some of whom were minors when the bill was filed. The complainants, in brief, set forth in their bill the above deed; that the complainants have always been residents of Tennessee; that the slave Nancy and her child were delivered to the said Nancy McLaurine and her then living children; that said slaves continued in possession of said Nancy and her children until January, 1829, when they were seized and levied on by a constable under a judgment against said William McLaurine as the latter's property; that said slaves were, against the will and consent of said Nancy, sold to one Patrick H. Braden to satisfy said execution; that Braden had notice of the claim of said Nancy and her children; that in said January, 1829, said Braden took possession of said slaves, and kept possession of them, together with two others born of said slave Nancy, until October, 1830, when he sold and delivered them to one William Monroe, who then and

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there, secretly and without the knowledge or consent of complainants, brought said slaves to Morgan county, Missouri; that about the year 1836 said Monroe delivered said slaves to one William Harley; that said Harley has since appropriated and enjoyed the hire, labor and services of said slaves; that both Monroe and Harley had notice of the rights, interest and claim of complainants, said Nancy McLaurine and her children.

Complainants also set forth that in July, 1829, a suit in chancery was instituted in the circuit court of Giles county, Tennessee, to enforce the rights of the said Nancy McLaurine and her children under the deed above set forth against the said Braden and Hartan, the constable, and others; that in 1833 an amended bill was filed wherein they charged that since the institution of the said suit, in the year 1830, said Monroe confederated and combined with Braden to place said slaves beyond the jurisdiction of said court, and purchased them and brought them to Missouri, and praying that he might be made a party; that afterwards and after process had been issued and returned from and to said Tennessee court, and after said Monroe had been made and become a party, said court, in the year 1838, made a decree in favor of the complainants in said suit, adjudging that said deed did not convey to said William McLaurine any interest which was subject to execution to pay his debts, and that Braden purchased with knowledge of the title of the complainants, and decreeing that said Braden and Monroe should deliver said slaves to the complainants within a specified period or pay their value, \$2,100, together with hire.

The complainants in the present suit make a transcript of the record in this Tennessee case, together with the deposition of Monroe on file therein, parts of their bill. They further state that said William Monroe died about the year 1847, intestate; that letters of administration were granted to his widow Lydia Monroe and his son Thomas Monroe. Complainants pray that said Thomas Monroe, Lydia Monroe, and said Harley be made parties defendant; that they be

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required to answer, &c.; that a decree be rendered against said defendants for the said slaves Nancy and her children, &c.

The defendant demurred to this bill. The court overruled the demurrer. The defendants answered separately. The court rendered a decree against the defendants Thomas and Lydia Monroe, as administrators, for \$5,282. The court admitted in evidence, against the objection of defendants, a transcript of the record and proceedings in Tennessee.

*Adams*, for plaintiff in error.

I. The demurrer was improperly overruled. The questions raised by the demurrer were not waived by answering. The decree of the court of chancery in Tennessee is a complete bar to this suit. That court treated the case as one between the complainants as *cestuis que trust* and the defendants as trustees, and the complainants in that suit elected to take a decree against Braden for \$2,100, the value of the slaves. They therefore waived all right to follow the slaves themselves into the hands of these parties in Missouri. Having made their election, they must stand by it. They can not insist upon opposite and repugnant rights. (2 Story Eq. § 1262.) Monroe's act in purchasing and bringing the slaves to Missouri, if wrongful at all, was a naked trespass. He was a stranger to the title claimed by McLaurine's children. They had an adequate and ample remedy at law for the supposed trespass. If they had any rights under the deed still subsisting, a court of law was the proper forum for redress. It is a naked case of trespass alone. If it can be brought in this court by merely joining the beneficiaries in a bill of complaint, then every trespass against trust property might be brought here to be tried. (*Gibbons v. Gentry*, 20 Mo. 477.) The answer of Braden in Tennessee is made a part of complainants' bill. Its allegations are not denied. It shows that the deed of gift to McLaurine's children was fraudulent and void as to his creditors, and therefore the execution sale of the slaves in Tennessee passed the title. (*Broom's Legal*

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Max. 428.) The statute of limitations is a complete bar to the complainants' bill. More than five years had elapsed after the majority of some of the complainants and before the commencement of this suit. (20 Mo. 520; 4 Term, 516; 2 Mo. 348; 2 Taunt. 445.) Monroe was not a trustee. It is not a case between trustee and *cestui que trust* so as to prevent the statute of limitations from running. Monroe has never recognized any right in complainants. He treated the slaves as his own and sold them to Harley. In such case the statute is a complete bar. (Hill on Trustees, 378; 2 Eq. Cas. Abr. 579; Williams v. Otery, 8 Humph. 563; 2 Barr, 52; 5 Mo. 454.) Monroe's estate had been distributed. The distributees were proper and necessary parties. If the deed of gift to McLaurine's children is not held fraudulent and void as to creditors, a life estate thereby vested in McLaurine's wife, which was the subject of sale under execution for her husband's debts. The husband is the absolute owner of the wife's personal property or possession, legal or equitable. The life estate passed by the execution sale in Tennessee.

*Douglass & Hayden*, for defendants in error.

I. The decree was rendered at the April term, 1855, of the Morgan circuit court, and filed at the April term, 1857, *nunc pro tunc*. The bill of exceptions was not allowed and signed until the April term, 1858. It was not therefore filed in time, and should be stricken out. (Farrar v. Finney, 21 Mo. 569; Ellis v. Andrews, 25 Mo. 327.) It was competent for the court to allow the decree to be filed *nunc pro tunc*. (Hyde v. Curling, 10 Mo. 359; State v. Clark, 18 Mo. 432.) But if the bill of exceptions should not be stricken out, there will be no error found in the proceedings of the court below. The record of the suit in Tennessee was competent evidence, and the objection to its introduction being general and not specific, will not be noticed by this court. (Grim v. Gamache, 25 Mo. 41.) It is a rule in equity that all persons coming into possession of trust property with notice of

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the trust, shall be considered as trustees, and bound with respect to that special property to the execution of the trust. (1 Pet. 309; 2 Madd. Ch. 125; Daniels v. Davidson, 16 Ves. 249.) William Monroe purchased the slaves *pendente lite*; and courts are not bound to take notice of any interest acquired in the subject matter of the suit pending the action. (1 Peters, 310.) An assignee *pendente lite* need not be made a party to a bill, or brought before the court, for every person so purchasing is treated as a purchaser with notice, and is subject to all the equities of the person under whom he claims in privity; and it matters not whether the assignee *pendente lite* be the claimant of a legal or an equitable interest, or whether he be the assignee of the plaintiffs or defendants. (Sto. Eq. Pl. § 156, 342, 348, 351; Sto. Eq. § 406, 908; 5 John. Ch. 93; 1 John. Ch. 578; 11 Ves. 194; 1 Sumn. 173; Osburn v. The Bank of the United States, 9 Wheat. 738.) This last case shows that a purchaser *pendente lite* is bound by the decree without being made a party; and bound by the answer of the defendant in the suit, as well as by the testimony in the case. So are privies in the estate claiming under such defendants. A subpoena alone is considered as *lis pendens*, and is notice to all persons, for otherwise the party might alien the property and baffle justice. This doctrine prevents purchases of litigated titles. (2 Madd. Ca. 325; 1 Verm. 318, 286, 57, 459; 3 Atk. 342.) The statute of limitations does not bar the plaintiffs' action. (R. C. 1825, p. —, § 1; King v. Lane, 7 Mo. 242-3; 15 Mo. 211; R. C. 1835, p. —, art. 3, § 11, 14, 16; R. C. 1845, p. —, art. 2, § 5, art. 4, § 1; Manning v. Hogan, 26 Mo. 570.) As to the force and effect of judgments of sister states see Story on Confl. of Laws, § 584-610 inclusive; Warren & Dalton v. Lusk, 16 Mo. 102.

SCOTT, Judge, delivered the opinion of the court.

We do not see on what evidence the decree in this cause is founded. This is a proceeding under the old chancery system prevailing before the practice act of 1849, under

which, if the evidence did not warrant the decree, it would be reversed. The only evidence material to the issues was the deposition of Monroe and the record of the judicial proceedings in Giles county in Tennessee, neither of which was authenticated so as to be read, even had the record been evidence for the purposes for which it was introduced. It is alleged in the bill that Monroe was not a resident of the state of Tennessee, and the process to bring him into court was returned not found; and it appears that afterwards there was an order of publication in the cause, but against whom it does not appear, as the transcript contains a mere minute that there was such an order. Now whether this action be a suit on the decree, or one to make Monroe liable here as trustee in respect to the slaves he is alleged to have removed from Tennessee, as he had no notice of the suit, it does not bind, nor is it any evidence against him. The decree in Tennessee is the only evidence on which the court below found the value of the slaves and their hire. As the decree on its face showed that it was not evidence, a general objection to the transcript being read was sufficient.

As to Monroe's being bound by reason of his having become a purchaser *pendente lite*, that does not make him liable as a party to the decree. His purchase during the pendency of the suit might render the property subject to the execution or order of the court in Tennessee, but his mere buying the property does not make him a party to the decree in such way as will make it binding on him as a judgment to which he was a party. He may be sued here in respect to the trust property, and the *lis pendens* in Tennessee might be evidence, as he bought the property there, of notice of the trust; but as mere assignee *pendente lite*, how can the foreign decree affect him? It might affect the property were it in Tennessee, but can it be used here as a decree against him?

We said the *lis pendens* in Tennessee "might" be notice to a purchaser of the slaves of the equity of the complainants. The law in relation to the question whether movable personal property is subject to the doctrine of *lis pendens*

does not appear to be settled. There is certainly a leaning in the courts against its application to such property. The cases on this subject are referred to in the case of *Winston v. Westfield*, 22 Ala. 570. As the parties have not alluded to this question in their briefs, we will hazard no opinion in regard to it. (*Murray v. Lilburne*, 2 John. Ch. 444.)

By the eleventh section of the third article of the statute of limitations of the code of 1835, and the sixteenth section of the third article of the act of the code of 1845, the statute of limitations of 1825 applies, as the cause of action arose under that act. This act being that which controls the limitation to this suit, the plaintiffs are not barred. (*King v. Lane*, 7 Mo. 241).

The record does not sustain the objection that the bill of exceptions was filed at a term subsequent to the decree without the consent of parties entered of record. The last page of the record shows that the bill of exceptions was filed at the term during which the motion for a rehearing was overruled.

It appears from the record that the complainants made the answer of Braden to their bill in Tennessee against him a part of their bill in the present suit. Now if the answer of Braden to the bill of complainants in Tennessee is a part of their bill filed in this state, we can not see how they will get along with the case. That answer shows conclusively that the complainants have no cause of action, as it asserts that the deed under which they claim is fraudulent and void, having been made to defraud creditors and purchasers. There must be some mistake or misapprehension in relation to this matter. As we would not hold the parties to a slip of their counsel made through inadvertence and with no sinister view, this act may be obviated by an amendment.

We do not concur in the view of the defendants' counsel, that the decree taken in Tennessee against Braden is a discharge of this action against Monroe. Where there is a right of action against several, a mere judgment without satisfaction against one is no discharge of the rest. Nor

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were the complainants confined to their action of trespass as their remedy. The complainants might have brought trespass, but they were not confined to that. They allege that Monroe has purchased from another property to which he had no right and with a knowledge of their claim to it. This makes Monroe a trustee in a court of equity for those whose property he purchased with notice of their rights. In cases of this kind an action of trespass and a bill in equity are concurrent remedies.

In our opinion, the deed of Madison McLaurine conferred no such interest on the wife of William McLaurine as was subject to execution. The legal title was not in her, and the slaves were merely left with her for the support of herself and children. A sale of the property was destructive of the purpose of the deed.

Reversed and remanded. The other judges concur.



THE STATE, Appellant, v. THOMPSON, Respondent.

1. An indictment charging that the defendant on, &c., at &c., "did then and there feloniously assault one J. D. with a certain handle of a hoe, a deadly weapon, by feloniously assaulting and striking him, the said D., with the said hoe handle, with intent, in so doing, him the said D. then and there feloniously to maim, wound and disfigure, contrary," &c., is a good indictment under the thirty-eighth section of the second article of the act concerning crimes and punishments. A felonious maiming is a felony.

*Appeal from Greene Circuit Court.*

This was an action against William Thompson. The indictment charges "that William Thompson, late of, &c., on, &c., with force and arms, in the county aforesaid, did then and there feloniously assault one James Davis with a certain handle of a hoe, a deadly weapon, by feloniously assaulting and striking him, the said Davis, with the said hoe handle, with intent, in so doing, him the said Davis then and there feloniously to maim, wound and disfigure, contrary," &c.

This indictment was quashed on motion of the defendant.

*Knott*, (attorney general,) for the State.

I. Had defendant succeeded in wounding, maiming or disfiguring Davis, he would have been indicted for felony under the thirty-ninth section of the second article of the act concerning crimes and punishments ; (R. C. 1855, p. 567 ;) and the only question now to be determined is, whether this is a good indictment under the first section of the ninth article of the same act for an attempt to commit the offence provided for in the section first above cited ; or for an assault with intent to commit a felony, under the thirty-eighth section of the second article.

*Price & Foster*, for respondent.

I. The offence charged is not indictable by the law of the land. The offence charged is but a common assault, over which justices of the peace alone had jurisdiction. (R. C. 1855, p. 977, § 1.) The indictment charged the assault was committed with intent to maim, wound, disfigure, &c. This is not made an offence by the statute respecting crimes. (R. C. 1855, p. 567, § 38.) It does not come within either of sections thirty-four or thirty-five, because those sections require all the maiming, wounding, assaults and batteries therein mentioned to be done on purpose and of malice aforethought. (5 Mo. 357.) This indictment does not so charge the assault. The assault, therefore, with intent to maim, wound, &c., is only common assault and battery before a justice of the peace, though made with a deadly weapon. (State v. Johnson, 4 Mo. 618.)

SCOTT, Judge, delivered the opinion of the court.

The thirty-eighth section of the second article of the act concerning crimes and punishments, punishes all assaults made with intent to kill, or to commit any robbery, rape, burglary, manslaughter, or other felony. This indictment charges the defendant with having made a felonious assault with an intent feloniously to maim, wound and disfigure. A felonious maiming is a felony. The defendant is then

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charged with an assault with intent to commit a felony, and the indictment is within the words of the law.

Whether the offence laid in the indictment is a common assault and battery not indictable, would be a question arising on the trial on the evidence. It is sufficient that the charge as made is a felony; whether it is or not will be determined by the evidence. The weapon used in making the assault is alleged to be a dangerous one.

Reversed and remanded. The other judges concur.



GOWAN'S ADMINISTRATOR, Appellant, v. GOWAN, Respondent.

1. Where a debtor deposits personal property in the hands of another as bailee with a view fraudulently to protect it from his creditors, such bailee can not avail himself of such fraudulent intent to defeat an action brought against him by the debtor for the recovery of such property.

*Appeal from Moniteau Circuit Court.*

This was an action for the possession of a female slave named Sylvia and her three children. The suit was commenced November 18, 1857. The defendant, Rebecca Gowan, in her answer denies the right of the plaintiff to the possession, and sets up the statute of limitations. The testimony adduced in support of the issues is set forth in the opinion of the court. The court, at the instance of the defendant, gave the following instructions among others: "1. If the jury believe from the evidence that A. P. Gowan was in debt in Tennessee, and brought the negro Sylvia to this state, and delivered her to A. G. Gowan, or he afterwards obtained possession of her and kept her by the consent of A. P. Gowan, to avoid payment of his debts, or to hinder or delay his creditors, they must find for defendant. The law in such case leaves the possession where it finds it, and will not assist the party intending the fraud, or his representatives, in regaining the possession. 4. If the jury are satis-

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fied from the evidence that A. P. Gowan gave the negro Sylvia to A. G. Gowan, and that he took possession of said negro at the time of the gift, or afterwards, by virtue of said gift and by A. P. Gowan's consent, they must find for defendant; and in such case no bill of sale was necessary to pass the title, nor is it material that A. P. Gowan obtained the negro in right of his wife."

It is deemed unnecessary to set forth the voluminous instructions—fifteen in all—given in addition to the above.

*Parsons & Ewing*, for appellant.

I. There was no pretence that the appellant's intestate ever parted with his title to Sylvia, unless it was by the alleged gift. Admitting even the alleged fraudulent intent, still A. G. Gowan was only a bailee, or depository, not a creditor, or grantee. Neither he, nor persons claiming under him, could set up the fraud to defeat the recovery by the absolute owner. (2 South. 742; 2 Hayw. 408.) It is admitted that where the absolute title to the property is passed with a fraudulent intent as to creditors, the grantor is without remedy, but that is not the case presented by the record. (Smoot v. Wathen, 8 Mo. 524.) The court erred in giving instructions to the jury. A. P. Gowan had no notice of any adverse claim. Statute would not run until then. (Keeton's heirs v. Keeton's Adm'r, 20 Mo. 530; 8 Mo. 522.) A. G. Gowan was trustee of an express trust. This possession never became hostile. (3 Johns. Cas. 124; 12 Johns. 367.) Defendant can not tack her possession to that of her husband for the purpose of bringing herself under the statute. (10 Cush. 241.) The evidence is against the defence of a gift, and is not sufficient to warrant the giving of the fourth instruction.

*Gardenhire*, for respondent.

I. Every conveyance of goods and chattels, in trust to the use of the person so making such conveyance is void against creditors. (2 R. C. p. 802, § 1.) Every conveyance or as-

signment in writing or otherwise of any interest in goods and chattels made with the intent to hinder, delay or defraud creditors, as to such creditors is utterly void. Every transfer of property, it matters not in what form, contrived to defraud creditors is void, and when void the party in possession may hold it against his fraudulent grantor, donor or bailor. It is the contrivance to hinder or delay creditors that makes the transfer fraudulent, and its being fraudulent enables the party in possession to hold it. Every pretended transfer of an absolute title cancels an actual bailment; running the property off into an adjoining state and hiding it, may do the same thing. The jury, in this case, have found that it did do it. There is a transfer of possession in both cases, a concealment of an actual bailment in both, and with the intent to defraud creditors. As the party in possession in one case can unquestionably hold it, why not in the other? The instructions fairly presented the case to the jury, and the judgment of the court below ought not to be disturbed. The tendency of the evidence fully supported the instructions given, and the jury having found the facts for respondent, their verdict ought not to be disturbed.

NAPTON, Judge, delivered the opinion of the court.

The first instruction given for the defendant in this case is not, in our view, correct. It asserts the principle that if a debtor puts personal property into the possession of another with a view to protect it from his creditor, the party in possession may avail himself of the fraudulent intent to defeat the action of the debtor for the recovery of his property. This is going farther than any adjudged case which has fallen under our observation, and we doubt the morality or expediency of the doctrine.

The statute against fraudulent conveyances declares every deed of gift and conveyance of goods and chattels, in trust for the use of the person so making such deed of gift or conveyance, to be void as against creditors; and every conveyance or assignment in writing or otherwise of any estate or

interest in lands or in goods and chattels, made to hinder and delay creditors, is declared void as against creditors and purchasers.

The statute has no application to a mere bailment, a simple delivery of possession, for the plain reason that such an enactment would be useless. The statute is intended to remove obstructions out of the way of creditors, and all transfers of title or interest from the debtor to a third person are abstractions, apparent or real, according to their good faith or want of good faith. If they are not made in good faith, but merely for obstructions to creditors, the statute sweeps them away and pronounces them of no effect, so far as creditors are concerned; but so far as the parties themselves are concerned, their relations to each other are not changed. The title is allowed, so far as the parties to it are concerned, to remain just where they have placed it, and the courts will not interfere to change the apparent condition of the title.

But in the class of cases to which the instruction we have referred to applies, the apparent and real condition of the title is the same. No title has been put in another which is at all in the way of the creditor. If the creditor can find the property in the hands of the bailee, he can just as readily subject it to his execution as though it remained with the debtor. The bailee sets up no claim; he admits the ownership of the bailor.

The conveyances and assignments referred to in the statute are good between the parties, and if they were also valid against creditors, the latter would be without redress, so far as the property conveyed was concerned. But in the case of a mere bailment, where nothing but possession is parted with by the owner, it does not concern the creditor whether the bailment was made from good or bad motives. The property is just as accessible to him in the one case as in the other. The bailee pretends to no title, and there is no necessity for changing the ostensible condition of things in order to make way for his claim.

The principle upon which courts of equity refuse to interfere in cases of fraudulent conveyances is, that the party complaining admits his own fraud and asks the court to assist him in getting back the title, where, but for that fraud, it always would have been. Courts of equity decline to aid him, and consider it best to let things stand as they find them. The party invoking their aid has forfeited all claims to it by his own conduct; and courts of law, when they took cognizance of frauds, adopted the rule. But the plaintiff here asks no aid of a court of law or equity to set aside any thing that has been done, either in the shape of a conveyance or otherwise. He simply asks that the bailment may be enforced; that as he put the property in the defendant's hands, subject to his order, he shall now have it again when demanded. No document or fact is alleged to show that the transaction was any otherwise than it appeared to be.

It may be questioned whether the determination of courts to give no assistance in the case of fraudulent conveyances, as between the parties, has been promotive of the ends of justice and is founded upon sound morality. It is seldom that both parties are equally to blame in a transaction tainted with fraud in each, and if they are, the doctrine seems to encourage a double fraud on the one side to punish the single fraud on the other. But we will not be understood as questioning the propriety of the general rule; we merely make the observation to show that it has been carried far enough. It ought not to be extended to cases not properly within its sphere. We might as well be asked to go further still and allow a defendant to defend himself against a just claim by the general allegation that the plaintiff was a dishonest person or had committed some crime.

The merits of this case, however, did not turn altogether upon the question we have first considered; the main points of defence, in addition, were a gift to the defendant's husband and the statute of limitations. Upon these points there were numerous instructions.

There was evidence which rendered it altogether proper to

put to the jury the question of a gift. The circumstances of the case were somewhat peculiar. Nearly twenty years before this action was brought, the plaintiffs' intestate, A. P. Gowan, then a resident of Tennessee, brought to this state the negro woman, whose children, together with herself, are now in controversy, with the avowed intention of opening or improving a farm and ultimately settling upon it with his family. Some of his neighbors, it seems from the depositions filed in this cause, believed that his object was to place this negro out of the reach of his creditors in Tennessee. However this may have been, it appears that A. P. Gowan was accompanied by the defendant's husband, then a youth about sixteen years of age, a natural son of A. P. Gowan's father, who had been raised in the family. The Gowan's rented a farm in Audrain county, and upon A. P. Gowan's return to Tennessee in the fall of the year of their removal (which was in 1841 or 1842) the negro girl was left in charge of the person whose farm had been rented, and young Gowan also remained. The latter shortly after removed to a neighbor's and took with him the servant girl, and in the course of the year 1842 or '43, he wrote to his brother in Tennessee that he expected to remove from this state and that he desired to know his wishes relative to the girl. The reply of A. P. Gowan was "to keep the girl until he called for her; and if he never called for her, she was his. A. G. Gowan." Witnesses testified that before A. P. Gowan left for Tennessee, he said he intended leaving the woman and two mares to Albert "for a start in this new country," as he was poor and had never received any thing from their father's estate.

This evidence, in connection with the length of time during which the defendant, and those under whom she claims, has been in possession of the slave, without the assertion of any claim on the part of A. P. Gowan, so far as the record shows, up to his death, which occurred four or five years before the institution of the suit, is certainly evidence proper for the consideration of a jury. There were facts also, on the other side, such as the insolvency of A. P. Gowan, and

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the source from which he derived his title to the slave, (by his marriage,) which ought to be considered. There was no evidence offered as to whether Gowan, the plaintiff's intestate, received other slaves by his wife, or what property he received from his father's estate. Nor was any proof offered to show that A. P. Gowan received the hire of the negro collected in this state. This latter circumstance would throw much light upon the subject, not only in reference to the question of a gift, but especially on the question of the statute of limitations.

In reference to the statute of limitations, it is obvious that the only real dispute which can arise on this point is, whether Alfred Gowan's possession here was adverse. That he had actual possession of the slave for nearly sixteen years is made manifest by the evidence, and that during this long period, more than three times the period required to bar the claim, he received all the hire of the woman and treated her in every respect as his property, is beyond question. If the hire thus received was appropriated to his own use, it would certainly go very far to make out an adverse possession, as the knowledge of A. P. Gowan of his actual possession of the slave is conceded. If, on the other hand, this hire was remitted to A. P. Gowan in Tennessee, that fact would show that the possession was not adverse. We find no evidence on this point in the record.

The judgment is reversed and the case remanded. The other judges concur.

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BUTLER, Appellant, v. IVIE, Respondent.

1. Justices of the peace have jurisdiction of actions for the recovery of specific personal property not exceeding the value of fifty dollars.
2. If a plaintiff, to give the justice jurisdiction of an action for the possession of specific personal property, allege the value thereof to be fifty dollars, the action may be defeated by showing that the value of the property, upon a just estimate, would exceed fifty dollars.

*Appeal from Newton Circuit Court.*

*Edwards & Ewing*, for appellant.

I. The court erred in giving the instruction asked by the defendant. The plaintiff alleged in his complaint that the value of the horse was fifty dollars, and even though that may be below the real value of the property, it can not injure the defendant, because he has the privilege of giving bond and retaining the property in his own hands; and if the jury should decide that the property was owned by the plaintiff, and that plaintiff was entitled to the possession thereof, it would not affect his rights even if it were worth five times as much as alleged. If the property was decided to belong to defendant, he, having it in his own possession, could not be injured.

NAPTON, Judge, delivered the opinion of the court.

This was a suit before a justice of the peace for the recovery of a horse, and the value of the horse was stated by the plaintiff to be fifty dollars. Upon a trial in the circuit court, where the case went by appeal, there was evidence to show that the horse was worth from seventy-five to one hundred dollars, and the court, at the instance of the defendant, instructed the jury that if the horse was worth more than fifty dollars the plaintiff was not entitled to recover. A nonsuit was taken because of this instruction, and the propriety of the instruction presents the only question in the case.

The statute gives justices jurisdiction of all actions for the recovery of specific personal property not exceeding the value of fifty dollars. (R. C. 1855, p. 926.) It will be observed that, in actions of this kind, before justices of the peace, the plaintiff, upon giving bond, is entitled to the possession of the property sued for. There is no provision, as in suits of this character in the circuit court, for the defendant's retaining the possession by giving his bond. He is not allowed any such privilege, but the plaintiff takes the property under all circumstances, and can retain the property if he prefers

doing so, although the judgment may be against him. The judgment is for a return of the property or payment of the value, at the option of the defendant. (R. C. 1855, p. 937, § 15.) But if the plaintiff does not see fit to produce the property, the defendant gets the assessed value; and though his title is not lost, yet another suit must be brought to recover the possession of the property itself.

The plaintiff is required by the statute to set forth the actual value of the property. (R. C. 1855, p. 934, § 1.) The jury, in ascertaining that value, can not exceed the sum fixed by the plaintiff; certainly not that prescribed by the act as the limit of the justice's jurisdiction.

It is quite apparent, in view of these provisions, that the plaintiff will not be injured by underrating his property; and if he can, by so doing, give the justice jurisdiction when a just estimate of the value would exceed the statutory limit, the statute may be very easily evaded. We see no better way of preventing this than the course pursued by the circuit court in refusing to let the plaintiff recover when the property is ascertained to exceed the amount to which the court is limited by statute.

Judge Ewing concurring, judgment affirmed. Judge Scott absent.



THE CITY OF LEXINGTON, Plaintiff in Error, v. AULL, Defendant in Error.

1. The City of Lexington was authorized by its charter "to levy and collect taxes upon real and personal property within the city, not exceeding," &c. (Sess. Acts, 1845, p. 161.) The Farmers' Bank of Missouri was incorporated by an act of the general assembly approved March 2, 1857, and established in the city of Lexington. (Sess. Acts, 1857, p. 34.) By the thirty-second section of said act it was provided as follows: "In consideration of the privileges granted by this act to the banks incorporated in this state, each banking company agrees to pay to the state annually one per cent. on the amount of the capital stock paid in by the stockholders other than the state, which shall be in full of all bonus and taxes to be paid to the state by the respective banks." By ordinance shares of stock in incorporated com-

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panies (excepting manufacturing companies) were subjected to taxation for city purposes. It was further provided that persons owning shares of stock that were taxable were not required to deliver to the assessor a list thereof, but the president, or other chief officer, of such corporation was required to deliver to the assessor a list of all shares of stock held therein, and the names of the persons holding the same. For a violation of this provision on the part of such officer by a failure to hand in such a list, the ordinance attached a penalty of one thousand dollars. *Held*, that the Farmers' Bank of Missouri was subject and liable to the tax thus imposed; that the penalty imposed upon the president for a refusal to hand in the required list to the assessor was legal and valid.

*Error to Lafayette Circuit Court.*

The fifth, sixth and nineteenth sections of a revenue ordinance of the city of Lexington approved May 13, 1858, are as follows: "Sec. 5. Persons owning shares of stock in incorporated companies, taxable by law, are not required to deliver to the assessor a list thereof; but the president, or other chief officer of such corporation, shall deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same. Sec. 6. If the president, or other chief officer of such corporation, fail to comply with the provisions of the fifth section of this article, he shall forfeit to the mayor, councilmen and citizens of the City of Lexington the sum of one thousand dollars, to be recovered as other fines and forfeitures." By another section the following property was subjected to taxation: "Ninth. Shares of stock in incorporated companies, except manufacturing companies, (the property of which alone shall be taxed)."

It is for a violation of the fifth section above set forth that this action is brought.

The cause was tried by the court without a jury. The court refused to give the following declarations of law asked in behalf of plaintiffs: "1. Under the charter granted to plaintiffs by the general assembly of Missouri, power and authority are given to plaintiffs to pass the ordinances read to the court in evidence in this case by plaintiffs, and plaintiffs had the power and authority, under their said charter,

to pass an ordinance imposing the duty on the defendant to give in for assessment and taxation the number of shares the stockholders have in said Farmers' Bank, in said city of Lexington; and said ordinance and ordinances in reference to the subject matter of this suit, passed by said plaintiffs, are of force and authority, and not null and void. 2. The plaintiffs had under their charter legal authority and power to impose a fine on defendant for his failure to give in a list of stockholders in said bank; and plaintiffs have authority and right, under the law of the land, to impose a tax for city purposes on the shares the stockholders hold in said bank. 3. From the facts in proof before the court the plaintiffs have a right to recover."

The court gave the following declarations of law asked by defendant: "1. The ordinance of plaintiff given in evidence, imposing the duty on the defendant to give in the number of shares the stockholders have in said bank to the assessor for the plaintiff, to be taxed for the benefit of plaintiff, is and was null and void. 2. The plaintiff had no legal authority to impose a fine on the defendant for his failure to give in a list of stockholders in said bank; and the said city have no authority in law to impose a tax for city purposes on the shares the stockholders held in said bank."

The court gave judgment for defendant.

*Ryland & Son*, for plaintiff in error.

I. Shares in bank stock may, under the charter of the city of Lexington, by proper ordinance, be assessed and become liable to pay taxes for city purposes. Such shares are property. The words "personal property" include money, goods, chattels, things in action, and evidence of debt. The word "property" includes real and personal property. (R. C. 1855, p. 1027.) The city had the right to levy the tax on the shares of bank stock for the support of the city government, the payment of the city debt, and for the improvement of the city. The power to impose the tax includes the power to pass such ordinances as, in the wisdom of the mayor

and board of councilmen, will best carry out the objects of the grant. The fifth section of the revenue ordinance, which requires the president, or other chief officer of the company, to deliver to the assessor a list of the shares of stock and the names of persons holding the same, is within the powers granted. Otherwise the shares might escape taxation, or the shares of some holders might be taxed and others not, thereby rendering such tax unequal as to the stockholders. This section is almost a literal transcript of the thirtieth section of the revenue law of the state. (R. C. 1855, p. 1331.) The city having the power to tax, had, as incident to this power, the authority to pass such ordinances as would make the exercise of the power efficient. Sections five and six are legitimate exercises of this power. The power given to the city to levy and collect taxes on real and personal property is not limited to such real and personal property on which the state levies and collects taxes for state purposes; but the power is general on real and personal property "not hereinafter excepted." The exceptions do not embrace shares of stock in banking or other incorporated companies. The "Farmers' Bank of Missouri" is not exempt from the payment of taxes. The bank agreed to pay to the state, for the privileges conferred on it, annually, one per cent. on the amount of the capital stock paid by the stockholders other than the state, which shall be in full of all bonus and taxes to be paid to the state. (Sess. Acts, 1857, p. —, § 32; 5 Gill, 231; Angell & Ames on Corp. 102, 244, 276, 283; 4 Pet. 152; 8 W. & S. 334; 6 Barr, 70; 4 Metc. 568; 3 How. 133; 15 Johns. 44; 5 Blackf. 250; 5 Gilm. 48; 1 B. Mon. 14; 9 Paige, 470; 2 Hill, 265; 4 Wheat. 411; 6 Humph. 515; 3 Gratt. 215; 10 Mo. 561; 24 Mo. 94; 3 Barn. & Ald. 12; 14 Ala. 402; 3 Zab. 510; 6 Pet. 736.)

*Hicks*, for defendant in error.

I. The charter incorporating plaintiffs and authorizing them to levy and collect a tax for city purposes, does not authorize plaintiffs to levy a tax on shares of stock owned by

persons in the Farmers' Bank located in said city of Lexington. The eleventh section of the act incorporating plaintiffs confers no such power. The words "to tax real and personal property" are the operative words in the act, and choses in action, bank stock, &c., are not and were not intended to be included by the words "real and personal property." The powers granted to corporations are to be strictly construed, and they have no rights except such as are specially granted, and those that are necessary to carry into effect the powers so granted. (15 Johns. 382; 15 Johns. 558.) The plaintiffs had no authority by their charter to impose the penalty on the defendant for failing to give in a list of the stockholders and the shares owned by them in said bank. This power, if to be found anywhere, is in the eleventh section of the act above referred to, and provides that plaintiffs may from time to time "pass such ordinances to carry into effect the objects and the powers hereby granted as the welfare of the inhabitants may require, and to impose and appropriate fines, penalties and forfeitures for the breach of any ordinance, and provide for the collection and execution thereof;" and an inspection of the grant of powers in the charter shows that the power in question is not one of them. See the whole of the eleventh section of the charter. Admit the state may, in its sovereign capacity, levy a tax of the kind, impose the duty on the president or chief officer to give in the amount of stock, impose a penalty for the refusal, yet the plaintiffs have no such power, unless derived from the charter, and it is not there found, and even the state has, by special enactments, thought proper to bring bank stock within the influence of taxation, and never yet supposed that under the words "personal and real estate" choses in action were included; and the plaintiffs, though circumscribed in their charter to specific objects for taxation, attempt and affect the sovereign power. Again, the plaintiffs have no power to say the owners of shares of stock need not give them in to their assessor, but that another man shall, or pay such penalty as they denounce. Bank stock is not a thing in itself capable

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of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon incomes, and of necessity confined to the person of the owner, who, if he be a nonresident, is beyond the jurisdiction of the state and not subject to its laws. (Angel & Ames on Corp. p. 536, § 458; Union Bank of Tennessee v. The State, 9 Yerg. 490; Johnson v. Commonwealth, 7 Dana, 338.)

Scott, Judge, delivered the opinion of the court.

This was an action by the City of Lexington, in its corporate capacity, to recover from the defendant, Aull, president of the Farmers' Bank of Missouri, a penalty of one thousand dollars, imposed by ordinance of the city, for his refusal, in pursuance to said ordinance, to deliver to the assessor of said city a list of the shares of stock held in said bank, and the names of the persons who held the same, for the assessment thereof of said city's taxes. The taxes were due for the year commencing June 1, 1858. The suit was begun in the mayor's court, where there was a judgment for the city, from which the defendant appealed to the circuit court, in which the judgment of the mayor's court was reversed, upon which the city sued out this writ of error.

The Farmers' Bank of Missouri was incorporated during the winter of 1856-7, and was established in the city of Lexington. The act creating the several banks in the state, by the thirty-second section of the first article, provided that, "in consideration of the privileges granted by this act to the banks incorporated in this state, each banking company agrees to pay to the state annually, one per cent. on the amount of the capital stock paid in by the stockholders other than the state, which shall be in full of all bonus and taxes to be paid to the state by the respective banks."

The City of Lexington was incorporated by an act dated March 8, 1845. The eleventh section of the charter provided that the mayor and board of councilmen should have power, among other things, by ordinance, "to levy and collect taxes upon real and personal property within the city not exceed-

ing one-half of one per cent., under the assessed value thereof," with some exceptions, none of which affect this case. By an ordinance, dated May 13, 1858, the city, among other things, imposed a tax on shares of stock of incorporated companies, excepting manufacturing companies, the property of which alone was to be taxed.

The main question we shall examine in this case is, whether, under the foregoing state of facts, the City of Lexington could impose a tax on the shares of stock in the Farmers' Bank of Missouri.

The City of Lexington was incorporated with a power to lay and collect taxes on real and personal estate within her limits at the time of the incorporation of the Farmers' Bank of Missouri. There is no hardship in making those who reside or do business in incorporated towns or cities contribute to defray the expense incurred for their government, by which conveniences are afforded and a degree of protection furnished not enjoyed by those who are not members of a municipal body. These advantages are obtained by means of taxes imposed on the inhabitants of the town or city, and are over and above those possessed by the people of the state at large. The citizens of the state pay a tax for the support of the government which protects them. The inhabitants of a city, being also members of the state, pay the same tax for the same purpose: but being likewise members of a municipal body, which affords them advantages in addition to those possessed by the people at large, they, in order to enjoy those advantages, are compelled to pay a tax to which the state at large is not subject. Hence, under our system of government, there are what are called state taxes paid by all the members of the community, and corporate taxes paid by the inhabitants of a municipal body. We can not suppose that these considerations were overlooked by the general assembly in chartering the bank. In providing that for a consideration the bank should be exempt from taxes to be paid to the state, it could not have been intended to interfere with a matter with which the state had nothing to do. The pay-

ment of taxes to a city is a matter between the city and her inhabitants. If a town wants advantages not prejudicial to the rest of the state, and is willing to pay for them, it is no concern of the state. If we put a construction upon the charter which will exempt the bank from the city tax, we make the state guilty of the injustice of taking away that tax from those to whom it rightly belongs. If what the state receives is in full of all taxes, state and city, would she not have made some provision by which a proportional part of the bonus she exacts should be paid to the city? With what justice could the state go into a city and take a bonus from a portion of the citizens, to be paid into her own treasury, in consideration that they should be exempt from the city taxes? How unjust would this be to the city? We can not suppose that the legislature intended such an act. It would in effect be taxing the city for the benefit of the state; for by exempting some, the taxes of the others would be increased, and that, too, not for the advantage of the city, but for that of the state. The state surrenders her right of taxing the banks. The taxes she imposes are in consideration of the protection given by her. This protection is enjoyed by all, and all contribute the means of obtaining it. Now if, in addition to this protection, which is common to all, other advantages may be obtained in certain localities by means of taxation, and if the banks will do business in these localities, why should they not be made to contribute to defray the expenses incurred in obtaining the superior advantages which they share? Because the state has exempted them from the taxes to be paid to her for the advantages she confers, why should they be exempt from taxes for advantages conferred at the expense of others?

We do not think that there is any force in the objection that the city had no authority to pass the ordinance which required the president of the bank to deliver to the city assessor a list of the shares of stock held in the bank and the names of the owners thereof. The idea of such an ordinance

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was suggested by the legislation of this state, as the ordinance, in its provisions, is very similar to the statute prescribing the mode of assessing taxes on the stock of incorporated companies. A more easy and effectual mode of assessing bank stock could hardly have been devised.

Reversed and remanded. The other judges concur.

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WEBB, Defendant in Error, v. TWEEDIE *et al.*, Plaintiffs in Error.

1. A justice of the peace has no jurisdiction over actions for injuries to personalty property, wherein the damages claimed exceed fifty dollars; nor can the plaintiff give jurisdiction in such case by waiving the tort in his statement and setting forth that he sues in assumpsit.
2. Objection to the jurisdiction of the justice on this ground may be made for the first time in the circuit court on appeal.
3. On the appeal of a cause from a justice of the peace, the same cause of action, and no other, is to be tried in the appellate court that was tried in the court below. If the justice had no jurisdiction because the damages claimed for injuries to personal property exceeded fifty dollars, the plaintiff would not be entitled in the appellate court to amend by changing the sum claimed to fifty dollars.

*Error to Lafayette Circuit Court.*

*Hicks*, for plaintiff in error.

I. The justice of the peace had no jurisdiction of the cause. (R. C. 1855, p. 925, § 2, 3. If the defendants or either of them were liable at all, they were liable purely as trespassers, and the evidence disclosed no state of facts upon which a contract, either express or implied, could arise. If the action of the court below can be sustained, then the distinctions made by the statute in conferring jurisdiction on justices of the peace in the various cases therein enumerated are all broken down and are useless. The same cause of action and no other is to be tried in the circuit court that was tried in the court below. (R. C. 1855, p. 975, § 18.)

The circuit court erred in not sustaining the motion to dismiss, and also in permitting the plaintiff below to amend so as to give jurisdiction; for if the justice had no jurisdiction, none could, even by the consent of the parties, be conferred on the circuit court. (20 Mo. 350.) The amount of damages claimed in the justice's court was clearly specified in the statement. Although a plaintiff may, in some cases, in a justice's court enter a remittiter for the excess beyond the justice's jurisdiction, he can not do this in the circuit court on appeal so as to give jurisdiction. (Bachelor v. Bess, 22 Mo. 402.)

*Field*, for defendant in error.

I. The court did not err in allowing said account to be amended. It is unreasonable to expect a justice of the peace to know in what class of cases the trespass may be waived and assumpsit maintained, this being a question of the nicest distinction in the legal profession, and it is not to be presumed that the justices are to understand distinctions that many practising lawyers do not understand, nor is it their office to understand such matters. (16 Mo. 530.) After the case was appealed to the circuit court, it was to be tried *de novo*; it was to be tried as though it was a new case taken up by the circuit court, disregarding all questions upon which errors had been committed below. (R. C. 1855, p. 974, § 13.) The plaintiff had a right to amend his account below so as to promote the ends of justice, and after said cause was appealed, and as soon as the above objection was taken, he had a right to amend in the circuit court. (R. C. 1855, p. 945, § 36.) Had he obtained a judgment for more than the jurisdiction, by abating the excess the judgment would have been good to the amount of the jurisdiction. The original account upon its face does not show that the suit was brought on a cause sounding strictly in damages. The account on its face would be good in assumpsit, and not until the proof was received was it fully developed that the action must be sustained upon the cause for trespass.

EWING, Judge, delivered the opinion of the court.

The plaintiff sued Tweedie and another before a justice of the peace on an account, claiming ninety dollars as the value of a bull killed by the defendant; to which was appended a statement to the effect that the plaintiff waived the wrong and sued in *assumpsit*. There was a judgment for the plaintiff for the sum claimed, from which Tweedie took an appeal to the circuit court. On a trial in the circuit court, after evidence had been given tending to prove that the defendants killed the bull, and that his value was seventy-five dollars, the defendants filed a motion to dismiss said suit for want of jurisdiction in the justice, which was overruled. Thereupon the plaintiff was permitted to amend the account by changing the sum claimed from ninety dollars to fifty dollars. Exceptions were saved by the defendants to the rulings of the court. There was a verdict against William Tweedie for fifty dollars; and motions by the defendant for a new trial and in arrest of judgment being overruled, he brings the cause to this court by writ of error.

A justice of the peace has original jurisdiction over actions for injuries to persons or to real or personal property wherein the damages claimed shall not exceed twenty dollars; and concurrent jurisdiction with the circuit court in such actions wherein the damages claimed shall exceed twenty and not exceed fifty dollars. This was an action for injuries to personal property; and the nature or cause of action, (which now characterises the classification as to jurisdiction,) can not be changed by giving it an obsolete name. Mere nominal distinctions between actions no longer exist, such as trespass, *assumpsit*, &c.; and the jurisdiction of the justice of the peace is not defined by employing any such terms or distinctions; hence what is said about waiving the trespass and suing in *assumpsit* is without force.

The failure of the defendants to make their objections before the justice, on the ground of want of jurisdiction, did not preclude them from raising the objection for the first

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time in the circuit court. The only restriction in this respect is that a set-off, not relied on before the justice, shall not be used in the circuit court on appeal. (11 Mo. 217.)

The appellant insists that the amendment was allowable under the statute authorizing a justice in open court in furtherance of justice and on such terms as may be proper to amend, on motion of either party, any statement, account, set-off, summons, writ, or other proceeding, &c. (R. C. 1855, p. 945.) By another provision, however, it is declared that the same cause of action, and no other, is to be tried in the circuit court that was tried in the court below. (R. C. 1855, p. 975.) The justice having no jurisdiction over the action as presented in that court, there was of course no cause of action that could have been properly or legally tried by the justice, and the circuit court could not acquire any jurisdiction or lawful authority over the case by appeal. We can not so interpret the section above quoted on the subject of amendments, as to authorize a party, by so changing his account or statement, to make a different cause of action, or to substitute a new one in the circuit court.

Judgment reversed; Judge Napton concurring. Judge Scott absent.

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HODGES, Respondent, v. RUNYAN, Appellant.

1. Where a public agent, in the character of such agent, acknowledges a liability—as where the president of a board of trustees of a school district, as trustee, promises, on behalf of such trustees, by a written promissory note, to pay a liability incurred for the building of a school-house—such agent is not personally liable.

*Appeal from Putnam Circuit Court.*

The following is the promissory note sued on: “\$65.00. St. John, Mo., April 8, 1856. Twelve months after date, I promise, on behalf of the trustees of school district No. 2 of

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school township No. 14, of Putnam county, Mo., to pay, to the order of Giles Hodges, the sum of sixty-five dollars, for value received. [Signed] Trustee, A. S. Runyan."

*Ryland & Son*, for appellant.

I. The court erred in striking out defendant's demurrer. The matters set forth, which must be taken as true, constitute a defence to the action.

*Harris*, for respondent.

EWING, Judge, delivered the opinion of the court.

This was an action on a promissory note by which the defendant promises to pay the plaintiff twelve months after date, "on behalf of the trustees of school district No. 2 of school township No. 14, of Putnam county, Mo.," the sum of sixty-five dollars, for value received, and signed by him as trustee. The answer alleges, among other matters, that the debt, for which the note was given, accrued to plaintiff for building a school-house for district No. 2, pursuant to an agreement entered into between the trustees and plaintiff previously to the execution of the note, by which agreement plaintiff was to receive his compensation out of such means and funds belonging to said district as might be lawfully appropriated to that object, and as might be within the control of the trustees when the demand became due; that defendant was then one of the trustees and president of the board, and that, by the authority and on behalf of said board, he, as such trustee and president of the board, executed said note for the consideration mentioned, and that said note, when given, was expressly understood between the plaintiff and defendant to be regarded as only the official act of defendant as trustee, and that he was not to be held personally liable for the payment of the same; that said note was to be paid out of a tax to be levied on the inhabitants of the school district for the purpose of building a school-house; and that there has not been any money in the hands of the trustees that could be used for the payment of said note.

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The answer, on motion of the plaintiff, was stricken out, and no further answer being filed, judgment was rendered for the sum claimed. The only question is whether the answer contained a legal and sufficient defence to the action.

An officer or public agent may, consistently with the policy of the law, waive his official immunity, and create a personal liability in contracts made on behalf of the public, but the presumption in such cases is, that no such personal responsibility is intended to be incurred; and that the obligee or payee looks to the credit and relies upon the good faith of the government, public, or corporation, as the case may be, for the fulfilment of the contract entered into with its agent or officer; and this presumption may be only rebutted by circumstances which clearly establish an intention to the contrary. (Story on Ag. 306.)

In the case before us the defendant has, by the terms of the instrument sued on, clearly designated the official relation in which he stood to the transaction and to the other parties thereto, and has so separated his official from his personal character as to create no legal obligation or impose no duty beyond that of applying the public funds to the discharge of the debt, when they shall be made available. The defendant contracts as a trustee, and, on behalf of the trustees of a school district in a particular township, he promises payment, thereby manifestly pointing to the source of the obligation, and undertaking himself to be the mere medium of transferring from the trustees, or district, whose officer or agent he is, a debt which he acknowledges to be due from such district as the real debtor. There was obviously no intention to create a personal liability by the note in question; and the plaintiff could not have been misled in any such belief by any thing it contains. See the case of *Tutt v. Hobbs*, 17 Mo. 488.

Judgment reversed and the cause remanded; the other judges concurring.

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Wall v. Nay.

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WALL, Respondent, v. NAY *et al.*, Appellants.

1. The sixth section of the act concerning the foreclosure of mortgages (R. C. 1855, p. 1089) allows persons, claiming an interest in the mortgaged property, to be made parties defendant, on motion, in suits for foreclosure, only with a view to the protection of their own interests. It was not designed thereby that a third party should be let into the suit with a view to the protection of the interests of the necessary parties. Such third party must show that some injustice would be done to him by letting judgment go against the other parties.
2. A person is not entitled to the reversal by the supreme court of a judgment for error committed against another.

*Appeal from Lafayette Circuit Court.*

It is sufficient to state, in addition to the facts stated in the opinion of the court, that at the same term at which Winsor was permitted to come in and file his answer, the plaintiff admitted the facts stated therein, and the cause was submitted to the court and judgment rendered for plaintiff.

*Ryland & Son*, for appellants.

I. The plaintiff showed no cause why an order of publication should be made against Nay. (R. C. 1855, p. 1222-4.) The plaintiff can not, under leave of court to file an amended petition, file one containing the original cause of action, and also other, different, distinct, and independent causes of action. This is bringing a new suit without any new summons. Notes coming due on the day before the amendment was made were embraced in such amended petition. (Holly v. Doane, 26 Mo. 186.) The judgment rendered is erroneous. The parties Nay and Durst were never properly before the court on the amended petition. The order of publication is not sufficient. Parties are not properly notified.

*Hicks & Silliman*, for respondent.

I. Winsor by his showing had no interest in the mortgaged property at the institution of this suit. He came in under the sixth section of the act concerning mortgages. (R. C. 1855, p. 1089.) Under that section he could only answer

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in bar of the deed, debt, or damages claimed. These were the only issues he could raise. The action of the court was regular. There is no judgment or decree against Winsor from which he could appeal. He only appeals from technical errors supposed to have been committed against Nay, and not for errors committed against himself, or growing out of matters set up in his answer. Nay does not complain. Defendant's interest is not injuriously affected by the judgment.

NAPTON, Judge, delivered the opinion of the court.

The sixth section of the act concerning mortgages provides that "any person claiming an interest in the mortgaged property may, on motion, be made defendant to any such proceedings, and may answer in avoidance or bar of the deed, or debt or damages, and issue shall be made and tried as in ordinary civil actions." Under this section the appellant, Winsor—who purchased the mortgaged premises after the commencement of this suit against Nay, the mortgagor—and Durst, the occupant of the land, was permitted to come in and defend. The suit had been progressing for upwards of eighteen months when Winsor applied to be made a party. The answer filed by Winsor set up a variety of objections to the proceedings. It alleged that there was no affidavit to authorize the order of publication against Nay; that the amendment made to the petition, at the second or third term after the suit was brought, embraced new causes of action and ought not to have been allowed; that the notice by publication against Nay did not embrace all the causes of action contained in the amended petition; that judgment by default against Nay and Durst was irregular; that the term when this answer was filed was not the trial term. In short, the answer contained a general review of the proceedings of the court against Nay and Durst had before Winsor came into the suit, and alleged them to be informal, irregular and illegal. There was no allegation that the deed was not valid or duly executed and binding upon all the parties to it, or that the money it was intended to secure was not due, or had been

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paid, or any part of it. On the contrary, these facts were admitted.

The only question we consider to be presented in the record is whether this answer is such an one as was contemplated by the section of the statute above referred to. If it was not, it ought to have been stricken out or disregarded.

The only object of this provision of the statute is to enable the party having an interest in the premises mortgaged to protect his own interests. It was not designed that a third party should be let into the suit with a view to protect the interests of the necessary parties. The law supposes them competent to attend to their own interests, and if they choose to neglect them, or waive the formalities prescribed for such proceeding, it is their business solely. It would be a strange anomaly, and contrary to all analogies, to allow objections to the mere forms and order of proceeding in a suit to come from a party who can not be in any way affected by them. Parties defendant are allowed to waive all forms and confess a judgment, or they may refuse or decline all participation in the case, and let the law take its course. If a court, under such circumstances, should see that any injustice was likely to be done, we suppose there should be no hesitation in arresting the proceedings, no matter how the matter might be brought up. But the class of objections urged in the answer of the appellant here, it is obvious, do not touch the merits of the defence, even so far as the original parties are concerned; they are purely technical. We do not wish to be understood by this that they are frivolous or captious, or that they would not be valid if coming from the proper quarter. We do not feel ourselves called upon to examine them. The party making them comes under the sixth section of the act above referred to, and must make such defences, and such alone, as that section provides for. His answer must show that some injustice would be done to him by letting judgment go against the other parties. This is not attempted according to our construction of the statute. Nothing is charged against the validity of the mortgage, and

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nothing against the existence of the debt. What issues of fact are presented by the answer? It is merely a review of the previous proceedings of the court. What is there to be tried by a jury, if issue had been joined upon the answer?

The effect of the action of the court below was to disregard the answer of Winsor. No judgment was given against him, but a judgment for a foreclosure and a personal judgment for the debt against the mortgagor, Nay. It may be conceded that Nay might have arrested the judgment or reversed it upon writ of error; but the only question, which the court decided touching the defendant Winsor, was that his answer was not sufficient under the statute. If that decision was wrong, he has a right to have it corrected; but if right, he was no longer in court. He has nothing to complain of. He has no right to come here and ask the judgment to be reversed for errors committed affecting Nay alone. The statute, under which he was allowed to come into the case, does not warrant such a construction. If it did, we can see how gross in justice might result. We may suppose a suit upon a plain note and a mortgage given to secure it. The parties, it is understood, do not intend to appear or make any defence. They may be in court every day during the progress of the suit, and yet pay no attention to it, knowing that the debt is justly due, and willing and agreeing that a judgment may be obtained. At the term, however, at which the suit is about to terminate, a third person purchasing the land directly or indirectly from the parties defendant, comes in under the sixth section of the mortgage act, and contests every step taken in the cause, and the disregard of forms, into which the plaintiffs may have fallen by reason of the understanding with the original defendants, is made to protract and delay the judgment or defeat it entirely, contrary to the agreement, and, it may be, the wish of the parties, who alone have any interest in the matter. We do not understand such to be the meaning of the statute. We think the answer should have been stricken out or disregarded, as proffering no issues in which the de-

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fendant Winsor had any interest or any right to defend. Judge Ewing concurring, the judgment is affirmed.

Judge Scott was absent at the hearing and determination of this case by reason of sickness in his family.

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THOMPSON, Respondent, RUSSELL, Appellant.

1. Exceptions to the giving or refusing of instructions should be taken at the time of the ruling of the court; the instructions should be incorporated in the bill of exceptions.
2. The supreme court will not grant new trials on the ground that the verdicts are against the weight of evidence.

*Appeal from Atchison Circuit Court.*

*Patterson*, for appellant.

*Vories & Vories*, for respondent.

EWING, Judge, delivered the opinion of the court.

The bill of exceptions does not show that any instructions were given or refused. In a paper attached to the transcript there appear what purport to be and may have been intended as instructions, but there is nothing whatever showing that they are any proper part of the bill of exceptions. If they were, however, no exceptions appear to have been taken at the time to the ruling of the court in giving or refusing them, and they would not therefore be reviewed by this court, although such ruling may have been made the ground for a motion for a new trial. (*Power v. Allen*, 14 Mo. 367; 27 Mo. 417.) There having been a trial and verdict by a jury, this court will not interfere with the judgment upon the ground that the court below refused a new trial because of the verdict's being against evidence or against the weight of evidence. (15 Mo. 193.)

Judgment affirmed. The other judges concur.

## ATWOOD'S ADMINISTRATOR, Plaintiff in Error, v. Fox, Defendant in Error.

1. A., by verbal agreement, in June, 1856, contracted to sell to B. his crops of hemp for the years 1856 and 1857, for which B. was to pay one hundred dollars per ton. The crop of the year 1856 was delivered to B. and the contract price paid therefor by B. A. offered to deliver to B. under the contract the crop of the second year, 1857; B. refused to receive the same. *Held*, that the contract was within the fifth section of the statute of frauds, not being to be performed within one year from the making thereof; that there was no such performance thereof as would take the case out of the statute; that the statute was a bar to any action, legal or equitable, on such agreement; that A. could not in a suit brought on such agreement, in which the statute of frauds was pleaded as a bar, abandon the special contract sued on, and recover on an implied agreement in the same action.

*Error to Carroll Circuit Court.*

*Troxell & Ray*, for plaintiff in error.

I. The court erred in sustaining the demurrer. There was such a part performance of said contract as took the case in a court of equity out of the statute of frauds. A fraud would be worked upon plaintiff if the defendant is allowed to set up the statute of frauds. A court of equity should interpose against the setting up of the statute of frauds. Equitable relief should be afforded. (2 Sto. Eq. § 717-720, 746, 760-1, 798, 764, 742; 1 Sto. Eq. p. 330; 2 Bars. on Contr. 554; 20 Mo. 84; 26 Mo. 221.)

*Harris*, for defendant in error.

I. The agreement was not to be fully performed within one year. No action can be brought upon it; notwithstanding there may have been a part performance. (3 Hill, 130; 2 Barb. Ch. 228; 2 Denio, 87; 9 B. Monr. 428; 1 Gray, 123; 26 Mo. 221.)

EWING, Judge, delivered the opinion of the court.

This was an action on a verbal agreement entered into in June, 1856, by which plaintiff's intestate agreed to sell and

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deliver his crops of hemp raised in the years 1856 and 1857, and for which defendant was to pay one hundred dollars per ton. The petition alleges the delivery of the crop for the first year and the payment therefor by the defendant of the contract price ; that in the succeeding year, 1857, he raised a crop of hemp, which, in the spring of 1858, he offered to deliver according to the stipulations of the agreement, but that defendant refused to receive the same ; that at the time of the delivery of the first crop hemp was worth at the place of delivery one hundred and thirty dollars per ton, and in the spring of 1858 it was worth only fifty dollars per ton.

There was a demurrer to the petition, which being sustained, the cause is here by writ of error. The cause assigned in the demurrer was that the agreement sued on was not to be performed within one year from the making thereof, and this seems to be conceded by counsel ; but it is insisted that the facts and circumstances alleged in the petition are such as to preclude the defendant from interposing the statute of frauds. The acts which, it is averred, entitle the plaintiff to the relief claimed are a *part performance* of the contract—namely, the delivery of the first year's crop of hemp. The construction of that branch of the statute by all the adjudged cases, without exception, it is believed, is that the agreement is within the statute, if it is not to be wholly performed or executed within the year, and part performance will not render the contract valid ; that the word performance must mean a complete and not a partial performance. (Boydell v. Drummond, 11 East, 142 ; Brangirdle v. Heald, 1 Barn. & Ald. 722 ; 9 Barn. & Cres. 392 ; Lockwood v. Barnes, 3 Hill, 130 ; Holloway v. Hampton, 4 B. Monr. 416.) It has been held that where the contract has been entirely performed on one side, the other side can not interpose the defence arising under the section of the statute in question ; but such is not the case before us. The agreement here is one which, although consisting of stipulations, a part of which are capable of performance within the year, the entire contract, and by its express terms, is not to be

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completed within that period, as it could not be from the nature of its requirements.

Had the agreement been in writing and one upon which an action at law could have been maintained, it is clear that a court of equity would not grant the relief which is here sought for a violation of the contract by the defendant. It would be no such contract as a court would undertake to enforce by decreeing a specific execution of its stipulations. The party would have an adequate and ample remedy at law, and the fact that an action on the agreement is interdicted by the statute because it does not comply with its requirements, can scarcely furnish ground for invoking the interposition of a court of equity to relieve from the operation of the statute, when, had the agreement been valid, the only remedy for a breach would have been a suit at law for damages.

It is further maintained that, although the facts alleged may not be sufficient to avoid the bar of the statute, yet the plaintiff ought not to be driven to another action to assert his rights under the implied obligation; that the defendant should be held responsible for the market value of the hemp in this action.

The action is upon an express contract, which, as we have seen, is within the statute, and the force of the statute operates upon the special agreement only by interdicting an action upon it. The plaintiff may recover for the hemp delivered, but he can not do so in this suit unless all rules of pleading are set at naught, and unless a party may allege one cause of action and recover upon another and a different one. According to the old system of pleading, where a party declared on a special contract, but failed to recover thereon, he might have recovered on a general count, if the case were such that, supposing there had been no special contract, he might still have recovered. The plaintiff has chosen to sue upon an invalid agreement instead of the implied promise of the defendant. The principle that no action can be maintained upon an implied promise where the subject matter is

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embraced in a special agreement, only applies where the special contract is valid and where there might be a recovery upon it. And had the plaintiff in this case brought his action upon the implied promise instead of the special agreement, the defendant could not have avoided it by proving the special agreement, because he must show such an one as would be valid in law. There was no necessity therefore for *experimental* suits, as the counsel supposes there was, in order to determine the legal rights of the plaintiff, nor to determine the "moral integrity" of the defendant, as his refusal to receive the second year's crop was a pretty clear intimation of his purpose to rely upon the statute.

Every petition must contain "a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;" and a plaintiff can only recover on the cause of action alleged in his petition. (*Luck v. Vaughn*, 17 Mo. 586.) Having declared on a contract a suit on which is interdicted by the statute of frauds, he can not, when that statute is interposed as a defence, abandon his special contract and recover on an implied agreement in the same action.

Judgment affirmed; the other judges concurring.



WEAVER, Defendant in Error, v. HENDRICK, Plaintiff in Error.

1. In ordinary actions for slander, where the words spoken are actionable in themselves, malice is implied; no express averment is, in such case, necessary to maintain the action.
2. Where, however, the words are spoken in the discharge of some public or private duty, or in the exercise of some right, express malice must be shown.
3. Any circumstances disproving, or tending to disprove, malice are admissible in mitigation of damages.
4. Where illegal testimony is introduced without objection, and the party introducing the same asks an instruction based upon it, the court may properly refuse to grant it.

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*Error to Greene Circuit Court.*

This was an action to recover damages for slanderous words spoken by the defendant of the plaintiff. The words were charged in the petition to have been spoken falsely and maliciously. The words charged and the evidence adduced in the cause are set forth in the opinion of the court below. Testimony was adduced by defendant to show the general bad character of plaintiff. In the deposition of one Bagley, which was read without objection from the plaintiff, was the following passage: "His (Weaver's) general character is bad. I know it in fact from what he told me. He said there was a man who planted some sweet potatoes, and he, Weaver, grabbed them up and took them home and planted them, and smoothed the hill he took them from. He did this in the night."

The court, at the instance of the plaintiff, gave the following instructions: "1. If the jury believe from the evidence that defendant Hendrick spoke and published of the plaintiff, Adam Weaver, [that he] stole corn, or that Adam Weaver had stolen his corn, and that the speaking of said words was before the commencement of this suit, they must find for the plaintiff. 2. If the jury believe defendant published and spoke said words of plaintiff, the words being actionable in themselves, the law implies malice, and it is not necessary that the plaintiff should prove express malice. 3. If the jury find for plaintiff, they can give any amount of damages not exceeding five thousand dollars. 4. The speaking the words in the presence of one or more persons is a publication."

The court refused the following instructions asked by defendant: "1. Unless the jury believe from the evidence that the defendant spoke the words laid in the petition of and concerning plaintiff maliciously, the jury ought to find defendant not guilty. 2. Although it is a general rule that malice is inferred from the speaking of the words, yet if the jury believe, from the evidence of plaintiff's witness, and from

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the manner and appearance of the defendant when he spoke the words, that he was not actuated by malicious motives, the jury ought to find the defendant not guilty. 3. If the jury believe from the evidence that defendant spoke the words and that maliciously, they ought to take into consideration his manner of speaking the words in mitigation of damages. 4. If the jury believe from the evidence that defendant had good reason to suspect plaintiff of being a thief from his, plaintiff's, own admission of taking potatoes out of the hills of another man, and carrying them home and planting them, that circumstance may be taken into consideration in mitigation of damages."

*Hendrick*, for plaintiff in error.

I. The question of malice should have been left to the jury. There was a conflict of testimony as to the manner of speaking the words. The instructions given took the question of malice away from the jury. Although malice is to be inferred from the speaking of the words generally, yet it is a fact for the consideration of the jury; and whether in this particular case and under all the circumstances in proof malice existed or not, it was the province of the jury to determine. The instructions assumed that the inference of malice was conclusive from the speaking of the words. The first three instructions asked by defendant involved the question of malice and should have been given. The fourth instruction was improperly refused. Although the testimony of Bagley about the potatoes was objectionable strictly under the pleadings, yet being offered in mitigation and not objected to, it ought not to have been withdrawn from the jury. The refusal of the instruction was in effect the exclusion of the testimony. The plaintiff had precluded himself from raising the objection. (21 Mo. 243.) The damages were excessive.

*Waddell, Edwards & Ewing*, for defendant in error.

I. The instructions given were correct. The words being actionable in themselves, malice was implied in law. There

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was no evidence tending to show a want of malice. (2 Greenl. Ev. § 418; 1 Mo. 140; 2 Saund. Pl. & Ev. 949; 1 Starkie on Sland. 214.) The court did right in refusing the instructions asked by defendant. The law on the subject of malice was fully given to the jury. The fourth instruction was properly refused. Defendant had all the benefit he was entitled to of the bad character of plaintiff he was able to prove. Bagley's testimony was inadmissible. Plaintiff was not precluded from objecting to an instruction based upon such testimony because he permitted it to be read without objection. The refusal of the instruction was not an exclusion of the testimony. The damages were not excessive.

EWING, Judge, delivered the opinion of the court.

This was an action of slander upon an imputation by the defendant that the plaintiff had committed larceny in stealing defendant's corn. The answer denied the speaking of the words, and, upon a trial, there was a verdict and judgment for three thousand dollars for plaintiff.

The questions presented by the bill of exceptions arise upon the instructions to the jury. On behalf of the plaintiff the jury were charged, in substance, that upon proof of the speaking and publishing of the words set out in the petition before the commencement of the suit, they should find for the plaintiff; and that the words being actionable *per se* the law implies malice, and it is not necessary that express malice should be proved.

The instructions asked by the defendant—which were refused—submitted the question of malice to the jury, and declared that if the words were not spoken maliciously the jury should acquit.

Under the pleadings and evidence in this case we think the law was properly declared in the instructions given by the court, and that there was nothing in the case to warrant the instructions asked by the defendant. The rule seems to be well settled that in ordinary actions for slander, where the

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words are actionable in themselves, malice is implied, and no express averment of malice is necessary to maintain the action. Malice is an inference of law from the falsity of the charge, except when the words are spoken in the discharge of some public or private duty, or in the exercise of some right, in which case express malice must be shown. Where the wilful act of publishing defamatory matter derives no excuse or qualification from collateral circumstances, none can arise from a consideration that the author of the mischief was not actuated by any deliberate and mischievous intention to injure beyond that which is necessarily to be inferred from the very act itself. (1 Stark. on Sland. 210.)

The same author remarks: "That such *malice in law* is, in the absence of any legal justification or excuse arising from collateral circumstances, sufficient to support the action for slander, seems now to be settled by the current of authorities." (Id. 212; 1 Greenl. Ev. § 418; 1 Mo. 140.) Where, however, the *occasion* and circumstances of the speaking and publishing are justifiable, a malicious intent is not presumed; and in such case express malice or malice in fact is essential to the right of action, and is obviously a question for the consideration of the jury.

In the case at bar the words imputed a larceny, and the answer denied the speaking. The allegations of the petition were clearly and fully sustained by the evidence; and it is not pretended that the circumstances of the speaking were such as to bring the case within the operation of the rule which requires proof of express malice to maintain the action. The instructions prayed by the defendant on this point were, therefore, properly refused.

The court was also asked to charge the jury that if they believed the defendant spoke the words and that maliciously, they ought to take into consideration his manner of speaking the words in mitigation of damages. Although there is often difficulty in applying the rule allowing evidence in mitigation of damages, and there is much contrariety of opinion as to the extent it should go, it seems to be settled

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that any circumstances disproving or tending to disprove malice are admissible. As to what circumstances are admissible in mitigation, our code has made no change, leaving that as at common law. Whether it is necessary, under our code, when the answer denies the speaking of the words, as in this case, to allege also the circumstances relied on in mitigation, as well as when the defendant alleges the truth of the matter charged, need not now be determined, as we conceive there was no evidence on which to base an instruction on this point, except that relating to the general character of the plaintiff; and the instruction applicable to this evidence was certainly as strong as the defendant could have desired, for it assumes the fact of the *bad character* of the plaintiff to have been *proved*.

The only evidence to which the instruction refused could have applied consisted merely of a remark by one of the plaintiff's witnesses on cross-examination. This witness stated on his examination in chief, that he heard defendant say "he would have had corn enough to have done him, if it had not been for old Weaver; he said Weaver had stole his corn; he did not know whether it was 1854 or 1855; it was early in the spring. I think he said Weaver had stole about forty barrels." On cross-examination he said: "The defendant exhibited no vindictive spirit, but laughed when he made the remarks." Three other witnesses testify positively the speaking of the words charged, without any qualification, and the manner or spirit evinced by the defendant. One of them says he heard defendant say twice that Weaver was a rogue and a d—d rogue, and that he had stole his corn. Another says he heard the defendant speak of it a good many times; that he had lost corn a time or two, and he always said Weaver had stole it; that he, Weaver, the d—d old rogue, had stole his corn, and he, defendant, could not spare any more. The other witnesses' testimony is substantially the same. The defendant offered no witnesses except as to the plaintiff's character.

The sense and meaning of the words charged being clear

and unambiguous, and the proof being conclusive as to the speaking, I can not see how the remark of the witness before referred to could have had any tendency to prove the absence of malice. It certainly had no tendency to prove that he believed or had reason to believe the charge to be true when it was made, or to show that he had no intention to impute to the plaintiff the crime of larceny, or the existence of any fact going in mitigation of damages. Under the circumstances of this case, the apparent good *humor* of the defendant, when he uttered the words imputing a crime to the plaintiff of such a character, could not neutralize the words themselves or their effect upon the object of the imputation. It was no antidote to the poison, nor could it arrest or repair the damage which is supposed to be done by such an assault upon character. The instruction was therefore well refused.

The fourth instruction asked by the defendant was erroneous. It is based upon the evidence of a particular act of the plaintiff intended to impeach his character, and relates to a matter having no connection with the subject matter of the alleged slander. The evidence was contained in the deposition of one of defendant's witnesses, and was read without objection at the time, it is true; but the court committed no error in excluding it from the consideration of the jury, or rather in refusing the instruction based upon it. (11 Mo. 237; 18 Mo. 178.) These cases recognize the power of courts to correct errors of this sort in the progress of a cause in civil cases. But the party complaining is he who offered the illegal evidence in the court below, and it is objected that he was deprived of the benefit of it as bearing upon the question of damages. Upon this point the instruction given by the court allowed the defendant the full benefit of all that the facts warranted with respect to plaintiff's character.

In reference to the damages found by the jury, we see no reason for interfering with the verdict. They do not appear to us to be so greatly disproportioned to the injury proved as to call for our interposition. This is a question peculiarly for the jury, who, especially in actions like this, can judge

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much more correctly than a court of the great variety of causes and circumstances that enter into an estimate of damages. And it is sufficient to add that the amount of the verdict is not such as to appear to have been the result of improper influences operating upon the minds of the jury. The other judges concurring, the judgment will be affirmed.

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THE STATE, Defendant in Error, v. HENLEY, Plaintiff in Error.

1. An indictment charging that the defendant, "at, &c., on, &c., feloniously, burglariously, and forcibly did break into and enter a certain meat-house and building, the property of one B., then and there being, by forcibly breaking the lock and door thereof, in which said meat-house and building there were then and there, at the time aforesaid, goods, wares and merchandise, and other valuable things kept and deposited; and that the said H. so brake into and entered said meat-house and building, as aforesaid, with intent then and there to commit a larceny, by then and there feloniously stealing, taking and carrying away the goods, chattels and personal property of the said B.; and five pieces of pork, &c., [describing the articles and giving their values;] all of the goods, chattels and personal property and valuable things of the said B., then and there being found in said meat-house and building, he, the said H., did then and there feloniously steal, take and carry away, contrary," &c., is a good indictment under the sixteenth section of the third article of the act concerning crimes and punishments. (R. C. 1855, p. 573, § 16.)
2. Where a person is prosecuted for both burglary and larceny in the same indictment, and is convicted of both offences, he may, under the nineteenth section of the third article of the act concerning crimes and punishments (R. C. 1855, p. 574), be punished by imprisonment in the penitentiary, in addition to the punishment prescribed for the burglary, not exceeding five years. The jury would be authorized in such case to assess the punishment for the larceny, in addition to that for the burglary, at any period not exceeding five years.

*Error to Cole Circuit Court.*

The following is the instruction referred to below in the opinion of the court: "If the jury believe from the evidence that the prisoner, at the county of Cole, at any time within three years next before the finding of this indictment, felo-

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niously, burglariously and forcibly broke into and entered the meat-house and building of Jesse B. Baber by forcibly breaking the lock thereof, with intent to commit a larceny by feloniously taking and carrying away any goods, chattels and personal property of any value whatever, they will find him guilty of burglary in the second degree, and assess his punishment to not less than three years in the penitentiary ; but if the jury further find that the prisoner, after burglariously, feloniously and forcibly entering said meat-house and building, did feloniously steal, take and carry away any goods, personal property or valuable thing of any value whatever, they will find him guilty of both burglary and larceny, and assess his punishment to five years in the penitentiary."

The defendant was found guilty, and his punishment assessed at five years' imprisonment in the penitentiary.

*Batte, Belch & Lay*, for plaintiff in error.

I. The court should have sustained the motion to quash and the motion in arrest of judgment. The indictment for burglary was bad at common law. (Whart. C. L. p. 685.) No statutory provisions make it good. It is not good under the sixteenth section of the third article of the act concerning crimes and punishments. It ought to have charged directly and affirmatively either that he broke and entered the building with intent to steal or commit a felony therein, or that he broke and entered said building with intent to steal the goods, wares and merchandise of the said Baber, which were at the time kept and deposited in said building, and not merely the intent to steal the goods, &c., of Baber, without alleging that it was the particular goods kept and deposited in said building. The indictment must charge an intent to commit a felony in the building, the intent to steal the particular goods deposited. (See Whart. C. L. p. 238 ; 1 Chit. C. L. p. 282.) This defect is not cured because defendant is charged with the actual commission of a felony in said building.

II. The instructions given were erroneous. The punish-

ment prescribed in the second instruction in case of conviction of both burglary and larceny is erroneous. The minimum punishment for burglary is three years. Under section nineteen the jury might assess the punishment for the larceny at imprisonment for any period not exceeding five years. The court had no right to fix the punishment arbitrarily. The other instructions were wrong.

*Knott*, (attorney general,) for the State.

I. The indictment is sufficient. (16 Mo. 550; R. C. 1855, p. 574, § 19; 3 Rawle, 207; 3 Fost. 301; 20 Pick. 356; 3 Metc. 816.) The court committed no error in giving instructions. The defendant can not complain of the second instruction. It fixes the lowest punishment that could be inflicted under the law. Three years is the shortest term for burglary alone. Two years is the shortest term for the larceny.

EWING, Judge, delivered the opinion of the court.

This was an indictment for burglary and larceny under the sixteenth section of the third article of the act concerning crimes and punishments, which declares that "every person convicted of breaking and entering any shop, store, booth, tent, warehouse, or other building, or any boat or vessel, in which there shall be at the time some human being, or any goods, wares, merchandise or other valuable thing kept or deposited, with intent to steal or commit any felony therein, shall, on conviction, be adjudged guilty of burglary in the second degree." The indictment charges that the defendant "at, &c., on, &c., feloniously and forcibly did break into and enter a certain meat-house and building, the property of one Jesse B. Baber, then and there being, by forcibly breaking the lock and door thereof, in which said meat-house and building there were then and there, at the time aforesaid, goods, wares and merchandise and other valuable things kept and deposited; and that the said Stephen Henley so brake into and entered said meat-house and building

as aforesaid, with intent then and there to commit a larceny by then and there feloniously stealing, taking and carrying away the goods, chattels and personal property of the said Jesse B. Baber, and five pieces of pork of the value of ten dollars, five pieces of bacon of the value of ten dollars, eighty pounds of pork of the value of ten dollars, and one bag of meal of the value of one dollar, all of the goods, chattels and personal property and valuable things of the said Jesse B. Baber, then and there being found in said meat-house and building, he, the said Stephen Henley, did then and there feloniously steal, take and carry away, contrary," &c.

It is maintained that the indictment is defective in omitting to charge the offence definitely and with the requisite certainty; that it fails to charge a breaking and entering of the building with intent to commit a felony *therein*, or to steal the goods, &c., of the said Baber *which were at the time kept and deposited in said building*. The constituents of the grade of burglary intended to be charged are a breaking and entering a building, in which there are goods, &c., kept, with intent to steal such goods. The indictment alleges the breaking and entering the house of Baber; that there were at the time goods, chattels, &c., kept and deposited therein, and then it alleges the intent with which the house was broken and entered—namely, to commit a felony by taking and carrying away the goods and personal property of said Baber, which are enumerated, and then adds, "all of the goods, chattels and personal property of the said Jesse B. Baber, then and there *being found in said meat-house and building*, he, the said Henley, did then and there feloniously steal," &c. The charge *totidem verbis* of an intent to steal the goods kept or deposited in said house would not, it is conceived, be more specific or certain than the averment, in the language of the indictment, of a breaking and entering with an intent to steal and carry away the goods of Baber, there being an antecedent averment that the building so burglariously entered was the property of Baber, and that goods

and chattels were kept or deposited therein. If the defendant is charged with a burglary with intent to steal the goods of Baber, which were then kept in the house so entered, what is the obvious intendment of the allegation that he entered said house with intent to steal the goods of Baber? What goods but those deposited in the house does the averment apply to? Were they other goods—goods kept elsewhere than in the building which he is charged with having entered with intent to steal?

But the objection to the indictment is invalid on another ground. Had there been no averment in so many words of a felonious *intent* in charging the offence of burglary, the charge of an actual felony in stealing the goods is a sufficient averment of intent. If the indictment charge a burglary with intent to commit a felony, it will be supported by evidence of a felony actually committed. And it seems sufficient, in all cases where a felony has actually been committed, to allege the commission of it, as that is sufficient evidence of intention. (1 Hale, 560; 2 East P. C. c. 15, § 25, p. 514; Rex v. Furinal, Run. Ry. 445.) An indictment in this respect may be drawn, says Archibald, in his work on Criminal Pleading and Practice, (vol. 2, p. 329,) in three ways—namely, stating the breaking and entry with intent to commit a felony; stating the breaking and entry and a felony actually committed; or stating the breaking and entry with intent to commit a felony, and also stating the felony to have been actually committed. The latter, he observes, is the preferable mode and that always adopted in practice; for if you fail to prove the felony committed, you may still convict of the burglary; or if you fail to prove the intent, &c., you may convict of the felony. In Jones v. The State, 11 N. H. 270, Justice Gilchrist, in delivering the opinion, says, it is well settled by the authorities, that in an indictment for burglary, the allegation and proof of the stealing are sufficient, without an averment of an intent to steal. To the same effect, Com. v. Brown, 3 Rawle, 207; State v. Ayer, 3 Fost. 301.

The jury were told, in the second instruction given on the part of the State, that if they found the defendant guilty of burglary as charged, they should assess his punishment to not less than three years in the penitentiary; but that if they also found him guilty of larceny, then they should assess his punishment at five years' imprisonment in the penitentiary. This instruction was erroneous. The minimum punishment for burglary in the second degree is three years; but the nineteenth section of the third article of the act concerning crimes and punishments declares that, "If any person, in committing burglary, shall also commit a larceny, he may be prosecuted for both offences in the same count, or in separate counts of the same indictment; and on conviction of such burglary and larceny shall be punished by imprisonment in the penitentiary, in addition to the punishment hereinbefore prescribed for the burglary, not exceeding five years." It is very evident this provision only fixes the maximum punishment, and that the jury would be authorized to assess it for the larceny, in addition to the burglary, at a day, month or year, or at any other period, in their discretion, not exceeding five years. The only possible doubt that could exist, we suppose, arises in connecting another provision—which declares that no person shall, in any case, be sentenced to imprisonment in the penitentiary for any term less than two years—with that just quoted, and, considering the one as a qualification of the other, rather than as distinct and independent provisions. It is true, larceny, when committed in committing burglary, is made a felony under the nineteenth section, irrespective of the value of the thing stolen; yet the sense of this section, its language alone considered, is not less clear as to the penalty, and it is only by introducing the words of the general provision referred to (R. C. 1855, p. —, art. 9, § 10,) and considering the two together, that the interpretation assumed in the instruction can be sustained. This is not admissible according to any rule for the construction of penal statutes. A penalty can not be raised by implication, nor should a particular clause un-

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ambiguous in its terms, directing a mode of prosecution and prescribing the punishment for an offence, be so qualified and controlled by a general provision as to impose a penalty not warranted by the plain and obvious sense of the former. The general provision in section ten can have effect without applying it to cases like that before us; it was evidently intended to apply to that class of cases where the statute was silent as to the minimum, but prescribed the maximum punishment that might be inflicted by imprisonment in the penitentiary; and as the least punishment for the grade of burglary charged is fixed by statute, and that is more than two years, that part of the tenth section quoted can have no proper application to larceny committed under the circumstances contemplated by the nineteenth section; for it is only where there is a conviction of both burglary and larceny that the latter, irrespective of its grade, is punishable as a felony, and the penalty is *in addition* to that prescribed for burglary.

Judgment reversed and cause remanded; the other judges concurring.



DULY *et al.*, Plaintiffs in Error, v. BROOKS, Defendant in Error.

1. By the third section of the territorial act of February 1, 1817, (1 Terr. Laws, p. 543, a justice of the peace of Missouri territory was authorized to take acknowledgment of deeds where the lands conveyed lay outside the county of which he was justice. (NAPTON, Judge, *dissenting*.)

*Error to Carroll Circuit Court.*

This was an action to recover possession of a tract of land containing three hundred and twenty acres, situated in Carroll county. The plaintiffs claim title under one Samuel Duly. The defendant put in issue the alleged right of possession of plaintiffs and set up the statute of limitations. At the trial the plaintiffs adduced in evidence an exemplification

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of the record of a patent granted by the United States, dated January 4, 1819, conveying the land in controversy to one William Hines. The land patented was military bounty land, granted in consideration of services in the war of 1812. The plaintiffs then offered in evidence, after making the proper preliminary proof, a certified copy of the record of a deed purporting to have been executed by the said William Hines, conveying the said land so granted to said Hines to Samuel Duly. This deed was dated December 11, 1820. From the certificate of acknowledgment, as certified, it appeared to have been acknowledged on the day of its date before a justice of the peace of the county of Montgomery, and territory of Missouri. No other evidence of the execution of said deed was offered independent of this certified copy of the record, including the copy of the acknowledgment before said justice. The court excluded said certified copy of the record on the ground that the deed was acknowledged before a justice of the peace of Montgomery county. The plaintiffs took a nonsuit, with leave, &c.

*Troxell*, for plaintiffs in error.

I. The justice had the authority to take the acknowledgment in question. (1 Terr. Laws, p. 543, § 3.) Their copy was therefore admissible. The land was military bounty land, and on that ground the copy was admissible. (R. C. 1855, p. 366, § 51-55.) It was in fact recorded more than ten years before the time of offering the copy in evidence. It was admissible on that ground. (R. C. 1855, p. 733, § 58.) The record shows substantially that plaintiffs and their ancestor had claimed and enjoyed the premises through the deed in question for more than ten consecutive years, and that deed was recorded at least ten years preceding the offer of it in evidence.

*Gardenhire*, for defendant in error.

I. The deed was properly excluded. A justice of the peace could not, under the third section of the territorial act of February 1, 1817, take acknowledgment of a deed con-

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veying land not situated in his county. (1 Terr. Laws, p. 543, 422-3, 179.) In 1813 counties were established and the jurisdiction of justices of the peace confined to them. The act of 1815 gave clerks of the circuit courts the right to take acknowledgments in the same manner as judges of the superior or circuit courts, "or any justice of the peace of the county where the land lies." (1 Terr. Laws, p. 422.) After the abolition of districts and the establishment of counties, there was no express law authorizing justices of the peace to take acknowledgments anywhere until the act of February 1, 1817. The object of the third section of the act of 1817 was to establish the authority directly. Montgomery county was established in 1818. (Id. p. 580.) No justice of the peace in it had jurisdiction beyond it.

SCOTT, Judge, delivered the opinion of the court.

The question in this case is whether a justice of the peace, under the third section of the territorial act of February 1, 1817, could take the acknowledgment of a deed conveying land not situated in the county in which he acted as a justice. By the territorial act of October 1, 1804, deeds were required to be acknowledged before one of the judges of the general court, or before one of the justices of the court of common pleas of the district where the land conveyed lies. So at that time justices of the peace could not take the proof and acknowledgment of deeds. By the act of July 7, 1807, (sec. 3,) it was made lawful for any judge of the court of common pleas within the territory, or for any justice of the peace of the district where the land lies, to take the proof or acknowledgment of deeds. It will be observed that this act enabled judges of the court of common pleas to take the acknowledgment of deeds for land wherever situated, and for the first time enabled justices to take acknowledgments, but limited their authority to the district where the land lies. Afterwards it was enacted by the third section of the act of February 1, 1817, that all deeds, conveyances, bonds and obligations for the conveyance of lands lying and being sit-

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uated in this territory, and the right of dower thereto and therein, may be proven and acknowledged before any justice of the peace in this territory, in the same manner and under the same restrictions as are now provided by law. As this is the section under which the question arises, the attention is called to its resemblance to the third section of the act of July 7, 1807, by which the limitation on the power of judges of the court of common pleas to take the acknowledgment of deeds was removed and made co-extensive with the limits of the territory.

We must, from courtesy, presume that the territorial assembly had some object in view in introducing an entire section into a statute. It could not have intended that, after its solemn enactment, the law should remain precisely as it was before, especially as it had been and then was in as plain terms as it could be expressed, and no doubt could have possibly been entertained as to its meaning. We should not make the legislature guilty of the folly of taking up a law as plain in its terms as it could be written, and which could not be misunderstood, and, without designing the slightest alteration in its sense, to reenact it in language, which can not be interpreted alike by all, and which gives rise to strife and litigation. The reenactment of the law in relation to justices of the peace taking the acknowledgment and proof of deeds, with the omission to reenact it as to all other officers performing the same duty, when we consider their authority was already co-extensive with the territory, can only be attributed to the fact that the intent of the law was to put all officers on the same footing so far as the taking of the acknowledgment of deeds was concerned. The words of the statute are "all deeds, &c., for the conveyance of lands, &c., lying and being situated in this territory, may be proved and acknowledged before any justice of the peace in this territory in the same manner and under the same restrictions as are now provided by law." So that any justice in the territory may take the acknowledgment of any deed. After the law had selected the agent and prescribed the ex-

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tent of his authority, all that remained to be done was to direct the mode of executing the power conferred, and that was all that was done. It would have been an unheard of course, after strictly designating the officer and the extent of his power, afterwards to curtail that authority by the use of a vague word which may have its full effect without being made to influence the preceding words of the sentence. The rule, *noscitur a sociis*, applies here, and the word "restrictions" is to be explained by those in connection with it. The word "manner" points out the object of its introduction, and shows it was only intended to be understood as applying to the restraints and formalities then imposed by law on all officers in taking the acknowledgment of deeds.

Attention has already been solicited to the resemblance between the language of the act of February 7, 1807, which removed the restraint on the power of judges of the court of common pleas in taking the acknowledgment of deeds, and that of the words of the third section of the act of 1817, which, it is maintained, was designed to have the same effect on justices of the peace. When the power of the judges of the court of common pleas was to be restrained in taking the acknowledgment of deeds, the judges were limited to "the district where the land lies." The power of justices in relation to the matter was limited by the same language. When it was intended to remove the restraint on the judges, these words were dropped. What else can be inferred from their omission in the reënactment of the law in relation to the power of justices in taking acknowledgments, but the design of removing the same restraint on them. The phrase "in the district where the land lies" had become familiar from its long and frequent use, and was a clear and distinct way of expressing the limitation on the power of officers in taking the acknowledgment of deeds, and it would be remarkable that the legislature should omit those words, and leave the restraint on the authority of justices to be inferred from the equivocal word "restrictions."

Geyer's digest was published in 1818. The law now un-

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der consideration was passed during the year 1817, and was published in that digest. At the period of the publication of the digest, the design and object of the law of 1817 must have been well known. In the digest, under the title "conveyances," p. 128, is found the original law with its limitation, conferring on justices the power to take the acknowledgment of deeds. To the words expressing the limitation there is a mark appended referring to the foot of the page, where there is a reference made to the section whose construction is involved in this controversy. If we will only look at the plan of that work, we will come to the conclusion that, in the opinion of its author, the limitation on the authority of justices in taking acknowledgments was removed by the act of 1817. Independently of the intrinsic weight of the author's opinion, the circumstance, that this construction was a cotemporaneous one, is on principle entitled to its full weight. Had the reference in the digest to the ninth section, as there published, which is the third section of the act of 1817, been only intended as one to a section on the same subject, the mark by which the reference was made would have been appended to the entire section and not to the particular words limiting the power of justices of the peace.

Judge Ewing concurring, reversed and remanded. Judge Napton dissents.



ANDERSON, Respondent, v. KINCHELOE *et al.*, Appellants.

1. The supreme court will not grant a new trial on the ground that an instruction unsupported by the testimony was given, unless the giving of such instruction was calculated to mislead the jury.
2. Courts should not give instructions amounting to a comment on the testimony, nor instructions calculated to mislead the jury by inducing them to attach undue importance to a portion only of the testimony, and to divert their attention from other facts entitled to consideration.
3. He who, knowing that he has no right to the possession of property, withholds the possession thereof from the true owner, who had wrongfully been deprived of the same, may be supposed to have assented to the wrongful act by which such possession was obtained.

*Appeal from Carroll Circuit Court.*

The defendants asked the court to give the following instructions: "2. The jury can not find against defendant Kincheloe unless they believe he authorized Dickenson wrongfully to obtain possession of said slaves from plaintiff, or afterwards withheld them from plaintiff, knowing that Dickenson had improperly brought said slaves away. 3. There is no evidence before the jury that defendant Kincheloe authorized or directed defendant Dickenson wrongfully to obtain possession of said slaves, nor that defendant Kincheloe withheld said slaves with a knowledge of any improper conduct on the part of said Dickenson. 4. Defendant Kincheloe is not responsible for any tortious or wrongful act or conduct of defendant Dickenson, unless he authorized the same, or knowingly ratified the same. 8. If the jury believe that plaintiff was legally entitled to the possession of the slaves in controversy in virtue of the alleged transfer thereof by said Gratz, the mere possession of said slaves by defendant Kincheloe would not render him liable to plaintiff in this action." Of these instructions the court gave the fourth, and refused the others.

The court gave the following instruction of its own motion: "10. The jury can not find against the defendant Kincheloe unless they believe he authorized defendant Dickenson wrongfully to obtain possession of said slaves from plaintiff, or afterwards withheld them from plaintiff."

The other instructions commented on by the court, together with the facts in evidence, are sufficiently set forth in the opinion of the court.

*Troxell*, for appellants.

I. Plaintiff showed no right to the possession of the slaves. There was no evidence that Dickenson was the agent of Kincheloe for the purpose of hiring the slaves to Gratz, or was authorized to submit the question as to their possession to arbitrators. The mere fact that the slaves were in possession of Kincheloe did not render him responsible for a wrong-

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ful conversion, nor did their mere retention by Kincheloe render him a trespasser *ab initio*. No asserted agency of Dickenson extended to an arbitration. The third and tenth instructions given to the jury were erroneous. The court improperly refused the second, third, seventh and eighth instructions asked by defendants. No authority to Dickenson to commit a trespass could be implied, nor could Kincheloe be held responsible for such trespass unless he had knowledge of its commission.

*Hicks*, for respondent.

I. Anderson had a right to the possession of the slaves. The court committed no error in giving or refusing instructions.

EWING, Judge, delivered the opinion of the court.

This was an action for the alleged wrongful taking and conversion of certain slaves. The petition alleges that in the winter or spring of 1859, one Henry H. Gratz hired of the defendant Kincheloe, of Carroll county, four slaves for the year 1859, and executed and delivered his promissory note to Kincheloe for their hire, and that said slaves were delivered by Kincheloe into the possession of Gratz, in Lafayette county; that in May, 1859, Gratz, being indebted to plaintiff, transferred the unexpired term of the hire of said slaves to him, and delivered possession thereof; that afterwards, in May, 1859, Dickenson came to Lexington and requested plaintiff to give up the possession of the slaves for Kincheloe, which being refused, it was proposed and agreed to that the matter be submitted to arbitrators; that said arbitration was accordingly entered into, and the slaves awarded to plaintiff for said unexpired term, which decision was mutually accepted by them as a final settlement of the matter in dispute. The petition further alleges that on the night of the following day on which the arbitration was had, defendant Dickenson wrongfully and secretly decoyed said slaves out of plaintiff's possession, and took and delivered them to the

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defendant Kincheloe; and that said defendants tortiously converted the possession of said slaves to their own use, and still keep possession of them from plaintiff, whereby he was damaged, &c.

The answer admits that Gratz hired from Kincheloe, about the time stated, the slaves in controversy, but denies that they were hired in the manner or upon the terms alleged; that said Kincheloe hired said slaves to Gratz to labor for him until December 25, 1859; and it was expressly stipulated in said contract of hiring that said slaves should be kept by said Gratz in the town of Berlin, Lafayette county, and not elsewhere, and that, in case they were removed from Berlin and especially to Lexington, Kincheloe might terminate the hiring and reclaim them; that the slaves were removed to Lexington by Gratz or plaintiff, or both, in violation of said agreement, and that plaintiff was well apprised of the terms of said contract of hiring; that the slaves were obtained from Kincheloe by plaintiff and Gratz with a knowledge of the latter's insolvency and with a fraudulent intent to deprive Kincheloe of their services. Kincheloe denies any knowledge of Dickenson's agency in taking the slaves from plaintiff's possession, and of the arbitration respecting them; denies that Dickenson had any authority from him to submit the matter to arbitrators. The defendants deny that the slaves were brought into Carroll county by Dickenson and delivered to Kincheloe, and that they were converted by them to their own use wrongfully or otherwise as charged, and deny that they withheld said slaves from plaintiff's possession. Kincheloe "admits that the slaves have been in his possession since some time last May, (1859,) and are now in his possession." "And these defendants aver that said Kincheloe's aforesaid possession of said slaves has always hitherto been and still is rightful and lawful."

From the facts the evidence conduced to prove and those admitted by the pleadings, it appears that there was a hiring of the slaves for one year by Kincheloe to Gratz; that pos-

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session was delivered to Gratz, who within a few months thereafter transferred or hired them for the remainder of the year to the plaintiff, and that while in his possession they were wrongfully taken therefrom by the agency of the defendant Dickenson, and soon thereafter were in possession of Kincheloe on his premises in Carroll county. This last fact is admitted by the answer, and it is claimed to be a rightful and lawful possession. There was also some evidence that Dickenson was Kincheloe's agent in hiring the slaves.

Of the instructions given for the plaintiff, the third only is excepted to. This instruction declares that if the jury believe the plaintiff and defendants submitted the matter in dispute, as to the possession of the slaves for the unexpired term of hiring, to arbitrators selected by them, and an award was made, of which they were notified, and it was against the defendants, they had no right afterwards to take said slaves from plaintiff's possession until after the expiration of the term of hiring. It is insisted that there was no evidence, as to Kincheloe, on which to base this instruction, and it should, therefore, have been refused. It may be conceded that there was no evidence of authority from Kincheloe to Dickenson to enter into an arbitration, yet we do not see that the jury could have been misled, or that Kincheloe was prejudiced; it was a mere abstraction which, under the pleadings, was not decisive of the questions at issue and did not involve the merits of the case. If there was no evidence whatever on which to base the instruction, as is maintained, it can scarcely be presumed that the jury paid any attention to it or were influenced by it in giving their verdict. And if it be said that the court, in giving it, must have assumed that there was some evidence to warrant it, and that this may be presumed to have had its influence with the jury, still whatever may have been their conclusion on this point, it left the question on which depended the plaintiff's right of recovery untouched. Taking the hypothesis of the instruction to be true, the plaintiff was not therefore entitled to a

verdict; it was nothing more than the assertion of a legal proposition, correct in the abstract, but of no practical bearing upon the case.

Instructions numbered five and six, asked by the defendants and refused, it is conceded by counsel, were not warranted by any evidence in the cause. But it is contended that the court erred in refusing instructions two, three, seven, eight and nine, and in giving the tenth on its own motion. The seventh declares that the rights of Kincheloe were not affected by the arbitration, unless there was evidence to satisfy the jury that he authorized it to be entered into, or after the arbitration was had he adopted and ratified the award therein made. The ninth declares that although Dickenson may have been Kincheloe's agent to hire and did hire the slaves to Gratz, he had no authority as such agent to enter into the arbitration. The point involved in these instructions has been sufficiently noticed in the observations made on the third instruction given for the plaintiff.

The eighth instruction states the hypothesis of a mere possession by Kincheloe as a deduction or conclusion, and the only one that could be legitimately drawn from the evidence in the cause, and of course excluded from the consideration of the jury any and all other facts which the evidence may have conduced to prove. It presents rather a comment on the evidence, selecting a single fact, which it assumes to have been proven, and tells the jury that this fact is not enough to render Kincheloe liable. Whether it was a mere possession or not, or such as showed an assent to the alleged wrongful act of his co-defendant, was for the jury, from a consideration of all the facts in the case, from considering how and when it was obtained, and the circumstances under which it was transferred from the plaintiff to Kincheloe.

The fourth instruction given for the defendants and the tenth given by the court on its own motion, though differing slightly in the phraseology from the second, which was refused, are substantially and in legal effect the same. At least, we do not perceive any inconsistency in the principle of

law set forth in them. The liability of Kincheloe is made to depend, in the tenth instruction, on his authorizing the alleged wrongful act of Dickenson in taking the slaves, or afterwards in withholding them from the plaintiff; and by the fourth, which was given for the defendants, he must have authorized or knowingly ratified such tortious act. Possession is either rightful or wrongful, and he who being in possession of property of which the true owner has been wrongfully deprived, withholds it from him, knowing that he has no rightful claim to it, may be supposed to have assented to the wrongful act of another, by which such possession was obtained.

It is further maintained that there is no evidence whatever to implicate Kincheloe in the transaction, or to connect him with it in any manner so as to create a liability, and that the third instruction asked by the defendants, which declares this proposition in substance, should have been given to the jury. We think it clear that the jury may have well inferred a contract of a general hiring from year to year, from the facts in evidence, particularly Winsor's testimony, and the admissions in the answer. The petition alleges a hiring of this character, and the answer admits a contract, but says it was a hiring upon certain terms and conditions, whereby the defendant Kincheloe could have terminated it and reclaimed the slaves. It is not pretended that there is any evidence whatever of such an agreement as the defendants allege, and the *onus* was of course on them to establish it. The hiring for a year being shown and the delivery of possession pursuant thereto being admitted or not denied, Gratz was the owner of the slaves for that period, and held them with all the rights incident to that kind of special ownership. Being thus in possession lawfully acquired, Gratz had a right to transfer the unexpired term to the plaintiff. The slaves were transferred to him, and soon thereafter were by the wrongful act of Dickenson, as the evidence tended to show, removed from his possession and found with the defendant Kincheloe.

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But it is contended that there is no evidence connecting Kincheloe with this act of Dickenson, either as an actual participant in it or as one assenting to it after it was committed. The counsel ventures an explanation to account for Kincheloe's possession by supposing that the slaves may have voluntarily returned to his premises in a day or two after they were alleged to have been decoyed, he knowing nothing of the manner in which they left the service of plaintiff; and that upon this hypothesis he was under no legal obligation to send them back. This hypothesis is not only unsupported by evidence but contradicted by the facts in the case. The jury, we think, could have reasonably made but one inference as to the manner in which the slaves got into Kincheloe's possession. The testimony of Tweedy, Hale and Scott is as strong as circumstances could well make it. If, therefore, the evidence tended to prove such a contract of hiring as already stated, the slaves were Anderson's or plaintiff's property for one year; and there being no pretence that they were reclaimed by Kincheloe under the contract he sets up, but being obtained by him through the wrongful acts of Dickenson, before the expiration of the term of hiring, he, Kincheloe, must have known that his possession was not a rightful one. Looking at all the evidence in the case; considering the agency Dickenson seems to have had in the business, commencing with the hiring of the slaves to Gratz, and continuing his connection with it in some capacity or other until their disappearance from plaintiff's possession; his evident participation in this last transaction; the appearance of the slaves so soon thereafter at Kincheloe's, and his admitted possession of them from about that time; the obvious motive to regain them by reason of the admitted insolvency of Gratz, it is impossible to say that there was nothing in all this from which a jury of practical men might have concluded that Kincheloe had knowledge of Dickenson's agency in removing the negroes from Anderson's and that he assented to it.

Judgment affirmed; the other judges concurring.

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Pope v. Jenkins.

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POPE *et al.*, BY THEIR GUARDIAN, Appellants, v. JENKINS,  
Respondent.

1. One P., in Kentucky, in the year 1843, being insolvent, mortgaged his property, including a slave named Ellen, to secure certain liabilities. No proceedings to foreclose the mortgage were instituted, but the mortgagees set up the property for sale at public auction, P. being present and consenting to the course pursued. The mortgagees purchased the slave Ellen at this sale, took and kept possession of her for two years and then sold her to one M. for a full price. M. gave said Ellen to the children of P. in 1846, and executed a deed to them in 1850, which was duly recorded in Kentucky. In 1851 P. moved with his family to Missouri, and in the same year sold said slave to one J. *Held*, in a suit for the possession of said slave and her increase, brought by the children of P. against said J., that, whether P.'s equity of redemption was extinguished or not by the sale by the mortgagees in Kentucky, the legal title was in the plaintiffs; that such equity of redemption, if unextinguished, did not stand in the way of a recovery by plaintiffs, the defendant not wishing to redeem.
2. In actions for the possession of personal property, the plaintiff, if he succeed, has the choice of taking the property or its value. By the value of the property is meant its value at the time of its valuation by the jury. If slaves, for example, are sued for, and they die in the hands of the defendant during suit, the plaintiff has no just claim for more than damages for their detention up to the time of their death. If the depreciation in value or death be produced by ill-treatment or neglect, or the slaves be sold to another, the rule may be different.

*Appeal from Platte Circuit Court.*

This suit was commenced March 5, 1856. The facts in evidence sufficiently appear in the opinion of the court.

Plaintiff asked the court to instruct the jury as follows: "1. Before the defendant can set up any claim to the negroes, he must show that he is a purchaser from Cyrus Miller, the donor, or from the children, his donees. 2. If the jury find from the evidence that Miller was an innocent purchaser of said slave Ellen from Bruce, Fisher, and others, for a valuable consideration—took said negroes into his possession and kept them some time, and then in 1846 gave said negroes into the possession of the children of Alamander and Mary Ann Pope, plaintiffs as aforesaid, and that the children have ever since retained the possession of the same under the

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gift aforesaid, then they will find for the plaintiff. 3. If the jury believe from the evidence that Alamander Pope, the father of these children, mortgaged said negroes, and that said negroes were sold under said mortgage to Bruce and Fisher and others by the knowledge and consent of Pope; that Miller afterwards purchased from them for a valuable consideration and gave said slave to the plaintiffs, and evidenced said gift by deed acknowledged and recorded as the laws of Kentucky require, then the title vests in the children, and Alamander Pope, or Jenkins claiming under him, are estopped from saying that no title passed to said children. 4. If Alamander Pope mortgaged said negroes to Bruce, Fisher and others, and said negroes were sold under said mortgage with his knowledge and consent, then said Pope, or Jenkins, claiming under him, are estopped from saying that no title passed from the mortgagor. 5. If Miller, at the time of the gift, delivered the possession of said slaves to the children of Alamander and Mary Ann Pope, and that said children lived with their father under his control, and were so living at the time defendant purchased from the said Pope, then the possession of the father was the possession of the children, and the law presumes that Jenkins purchased with notice; and unless he shows he purchased from Miller or the children of Pope, he acquires no title, nor had Alamander Pope any title or right to convey the same or any interest therein. 6. If the jury believe from the evidence that Miller was an innocent purchaser for a valuable consideration of said negro; that he gave said negro and gave them the possession thereof, then it is immaterial whether Pope at the time of the mortgage contemplated a fraud or not, and Jenkins, his assignee, acquired no title to the property in question. 7. The answer admits that the slaves bought by Jenkins are the same sued for and described in plaintiff's said petition. 8. The answer admits the appointment of Moore as guardian, and his substitution as one of the plaintiffs in this cause. 9. If the jury find for plaintiff, they will also find the value of the negroes without taking into consideration

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the death of either of them. 10. That the certificate of the clerk endorsed on the deed of gift from Cyrus Miller to the children is evidence, or evidence that it was recorded as therein stated. 11. If the jury find for plaintiff, they will find the value of the slaves now living." Of these instructions, the court gave those numbered seven, eight, ten and eleven, and refused the others.

The court, of its own motion, gave the following instructions: "1. If the jury believe from the evidence that the negro Ellen was conveyed by deed of mortgage to Henry Bruce, William Bruce, Richard Fisher, and Jachaar P. Fisher, by Alamander Pope, and that subsequently thereto the negro was sold by the mortgagees at public sale with Pope's consent, and that at such sale the negro was bought by the mortgagees, then such sale is void as to a subsequent purchase from Pope without notice; and unless they believe that defendant purchased of said Pope with such notice, they will find for defendant. 2. If the jury believe from the evidence that the negro Ellen was conveyed by deed of mortgage as above, and that subsequently thereto the negro was sold at public sale by said Pope, with the consent of the said mortgagees, [and they] became the purchasers for a valuable consideration, the sale was valid; and if they believe Miller purchased from them and by deed of gift gave the negroes to plaintiff and delivered the possession of the negro at the time, they will find for plaintiff."

*Vories, Hall & Spratt*, for appellants.

I. The court erred in permitting the defendant to file supplemental answers. The court erred in giving and refusing instructions. The sale by the mortgagees was, under the circumstances, a good and valid transfer of the property in the slave. Miller assigned a good title to the slave. (11 Mo. 555.) The plaintiff's title is therefore good. The court erred in its ruling as to the measure of damages. The defendant gave bond. He retained them at his peril, and is responsible for them or their value.

*Woodson*, for respondent.

I. Under the law of Kentucky the sale to the mortgagees was invalid. (1 Monr. 44; 3 Litt. 410; 5 Litt. 202; 9 Dana, 190; 6 Dana, 474; 12 Mo. 106; 1 Mor. & Brown's Dig. 449.) Defendant was an innocent purchaser. The plaintiffs were not entitled to recover the price of the dead slaves in any case. (R. C. 1855, p. 1243; 13 Mo. 612; 24 Mo. 269; 25 Mo. 301.)

NAPTON, Judge, delivered the opinion of the court.

This suit was brought by the children of Alamander Pope, through their guardian, to recover several slaves sold to the defendant by their father. The defendant gave bond as required by the statute, and retained possession of the slaves. During the pendency of the suit three of the slaves died, and this fact was brought to the attention of the court in a supplemental answer filed by the defendant.

It appears, from the evidence preserved at the trial, that Alamander Pope, in 1843, lived in Boyle county, Kentucky; that at this time he was hopelessly insolvent, and in order to secure certain of his friends, who had become his securities to a large amount, he had executed a mortgage of his land and slaves, and perhaps all his property, including a negro woman named Ellen, who was the ancestress of the slaves now in controversy. As the mortgaged property was believed to be insufficient to pay the mortgage debt, no proceedings to foreclose were instituted, but the mortgagees, to save expense, as they alleged, set up the property at public auction, Pope being present and consenting to the course pursued. The negro woman Ellen was purchased by the mortgagees at this sale, taken into possession for two years, and then sold to Cyrus Miller, a brother-in-law of Pope, for a full price. Miller gave the woman to the children of Pope in 1846 and executed a deed to the children in 1850, which was duly acknowledged and recorded according to the law of Kentucky. In 1851 Pope and his family removed to this state,

and the defendant's title is derived from a sale made to him by Pope.

We do not conceive it necessary to allude to the instructions in detail which the court gave the jury on the trial of this case. It will be seen, upon an examination of them, that the case was made to turn principally upon the validity of the sale made by the mortgagees in 1843. The jury were instructed, that if the sale was made by the mortgagees with Pope's consent, it was void so far as the defendant purchasing from Pope without notice was concerned; but if the sale was made by Pope with the consent of the mortgagees, the sale was good, and the plaintiffs must recover. We confess ourselves unable to appreciate the distinction which these instructions attempted between a sale by the mortgagees with Pope's consent and a sale by Pope with the mortgagees' consent. We do not perceive how a sale by the owner of an equity of redemption, (which equity was in this case, as it is proved, of no value whatever,) with the assent of the owners of the legal title, could be any more available to pass the title than a sale by the legal owners, with the assent of the person having an equity of redemption. The instructions appear to have been based upon a statute of Kentucky, passed in 1820, which declared all sales by trustees under deeds of trust or pledge of any estate to be invalid unless made under the decree of some court of chancery, upon proceedings had thereon as in the case of mortgages, or unless the makers of the deed or pledge joined in the deed or writing evidencing the sale. (Ky. Dig., Morehead, Feb. 11, 1820.) This act is evidently intended for deeds of trust, and such other conveyances in pledge as, previously to its passage, would have authorized the trustees to make a sale and pass a title to the property pledged without the interposition of any legal proceedings. It has no application to mortgages, which contained in the deed no power of sale in the mortgagees, and which, by the principles of the common law, and without reference to this act, required a regular foreclosure to extinguish the equity of redemption of the mortgagor.

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This question, however, in relation to the validity of the sale made by the mortgagees, upon which the merits of the case were made to turn upon the trial, was not, in our view of the case, anywise material to its proper determination. Admitting the sale to have been irregular and invalid, how is this circumstance to affect the title of the plaintiffs or the defendant? The invalidity of the sale in 1843 by the mortgagees certainly does not put the title in Pope. It only amounts to this, that the equity of redemption was not extinguished. The legal title was still in the mortgagees, and they conveyed it to Miller, and Miller conveyed it to Pope's children, the plaintiffs in this case. The Kentucky statute was certainly not intended to impair the right of a mortgagee to transfer his legal estate; it merely provided against the extinction of an equity of redemption, unless one of the two modes pointed out in the act was pursued. It was for the benefit of *cestuis que trust*, but was not designed to make trust estates inalienable.

There is no dispute about the validity of the mortgage in 1843. There was a transfer of possession as well as of title from Pope at that time, and from that time until his attempted sale to the defendant in this state in 1851 he was put in possession of the slave Ellen or her descendants. It is true that, upon Miller's conveyance and transfer of possession in 1845 or 1846 to his children, Pope, as their natural guardian, had such possession as the title warranted; but such a possession was not adverse to the title of the children, but in conformity to it. His possession was theirs, and however long continued, it would give no title. It was not until his sale to the defendant that he could be regarded as asserting an adverse possession. At least, we have no evidence of any previous act of adverse possession. Here was then a lapse of eight years during which there was an adverse possession against his equity of redemption. Admitting, however, that adverse possession for five years would not in general give title against an equity of redemption, it is, to say the least, doubtful whether a court of equity would allow it to be

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asserted under the circumstances of this case. Pope was present when the mortgaged property was put up at auction; he undoubtedly assented to the sale, although he did not, as the Kentucky statute in reference to deeds of trust requires, join in the deed or writing which was the evidence of the transfer given to the purchasers by the mortgagees. Pope's equity was in truth a merely nominal one, a barren one, if we take the facts to be as they appear from the bill of exceptions. Would a court of equity permit him, under such circumstances, and after such a lapse of time, to assert his equity of redemption? Miller supposed himself to be buying the absolute title, both legal and equitable, and the mortgagees supposed themselves to be selling the absolute title, for they had previously, as they thought, extinguished the equity of redemption. Would not a court of equity, then, regard Pope as using the mortgagees as his agents to sell whatever title he had? A man of full age and sound mind may waive formalities, which the law allows him for his protection and not as a means of committing fraud upon others.

But the question whether Pope's equity of redemption was lost by his conduct at the sale by the mortgagees, by lapse of time, or by all the circumstances attending the transaction taken together, is not at all, so far as the evidence shows, of any materiality in the decision of this case. It is not pretended that Pope, or his assignee, the defendant, wishes to redeem this property by paying off the debts it was mortgaged to secure. The legal title is alone in controversy, and that, according to any view of the case, appears to be plainly in the plaintiff.

We have assumed the transactions referred to in this opinion as having been throughout *bona fide*. No fraud was suggested, and no instructions were asked raising any point of this kind.

In relation to the death of three of the slaves sued for, which occurred after the institution of the suit and was suggested by supplemental answer, the question presented is not

free from difficulty and doubt, and, it must be confessed, has been very differently viewed by different courts. Our opinion, however, will be based principally upon our statute, which regulates the action brought in this case, and upon what we believe to be principles of sound public policy and natural equity.

This subject was discussed many years ago by the court of appeals of Virginia in the case of *Austin's Executor v. Jones, Gilmer*, 341; but the court was divided and the point not determined. Judge Roane placed his opinion upon very narrow and technical grounds, but Judge Coalter took the position, which we find subsequently adopted by Judge Garston, of North Carolina, in a very able and elaborate opinion; (*Bethen v. McLennon*, 1 Ired. 531;) and the views of Judge Garston and Judge Coalter commend themselves to our judgment as most applicable in the construction of our statute concerning suits for the recovery of specific property, and entirely consonant with the claims of equity and public policy.

Before the adoption of our present code of practice, which abolishes the forms and names of actions as known to the common law, there was a distinction between *detinue* and *trover*, although, in many cases, it was at the option of the plaintiff to bring whichever he preferred. In *trover* the plaintiff admitted the title to the property sued for to be in the defendant, and only asked damages for the conversion, which he asserted was wrongful. In *detinue* the plaintiff claimed to be the owner still, and demanded the specific property detained. As the act of God does an injury to no one, though it may occasion a loss, the loss, of course, falls upon the owner, and, therefore, where *detinue* was brought and an accidental loss occurred by the death of the property sued for, it must fall upon the plaintiff if determined to be the owner. But it was otherwise in *trover*, where the plaintiff admitted the change of title, and only claimed damages for its conversion; there the loss would be the defendant's,

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upon the same principle that it would be the plaintiff's in detinue.

In detinue the value of the property at the time of the assessment was the amount for which the defendant was responsible, if the property itself was not produced. The injustice of a contrary rule was strikingly illustrated by Judge Garston, by supposing a protracted litigation for a negro child, who, at the termination of the suit, has grown up to manhood. The injustice of substituting for the slave his value when a child would be apparent. So it would be equally unjust to require the defendant to pay the value of a slave who died during the progress of a suit. The learned judge very forcibly illustrates the impolicy of such a doctrine as applied to slaves. "It is not undeserving of consideration," says Judge Garston, "that, in many cases, actions of detinue are brought to try some of the most difficult questions of title to slaves, and when both parties are equally conscientious in asserting a claim thereto. If, in all cases, the holder is not only to be liable, in the event of failure, for hire, whilst they are in his possession, but also to be insurer of their lives, we drive him to the often inhuman alternative of making the most of them by sale instead of keeping them to abide the fair result of the contest. In this case it would be manifestly unjust, because of a mere mistake of title, to make him responsible for an act of Providence, which no prudence could avert, and which would probably have occurred had the possession been with his adversary. It is enough that, using the property humanely and prudently, he account for the use of it, and deliver it up, if it exist, when the controversy is decided against him."

When there is culpable neglect, or the death is produced by ill-treatment, or the slaves are sold to another for full value, the rule may be different.

In the case of *Suydam v. Jenkins*, 3 Sandf. Sup. C., we find a very learned disquisition upon this subject, leading to conclusions quite the opposite to those reached in the cases

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we have just adverted to. But we think the difficulties suggested by Judge Duer in the way of the rule for which we have intimated our preference might be obviated by allowing the jury, in the form of damages, to estimate the depreciation of property occasioned by its detention by the defendant. The question to be determined here is, not as to the measure of damages, but as to the value of the property. Our statute gives to the party succeeding the choice of taking the property or its value. These terms are understood therefore to be equivalent; but they would not be so, if, by the value of the property, is meant its value three years perhaps before its assessment, or any other period during which the litigation has been progressing. We understand it to be the value of the property at the time of its valuation by the jury. If the property sued for be slaves, and they are dead, they are of no value; and if the death has been accidental, there is no just claim on the part of the owner for any thing more than damages for their detention up to the time of their death. If the death or depreciation in value be occasioned by the act or culpable negligence of the defendant, or he has, after giving bond for their forthcoming to answer the judgment of the court, disposed of them to another, the question is materially varied. We confine ourselves to the case before us, in which the death is averred to have been an act of Providence, and no question was made, so far as we have observed, that such was not the case in fact.

The judgment is reversed and the case remanded. The other judges concur.



CITY OF ST. JOSEPH, Appellant, v. ANTHONY, Respondent.

1. The general assembly may authorize a municipal corporation to macadamize streets within its limits, and to apportion and charge the cost of such macadamizing on the adjoining lots in proportion to their front.
2. In order to authorize a municipal corporation to recover the amount charged against an adjoining lot on account of the macadamizing of a

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street, a substantial compliance with the law must be shown; an observance of all the formalities prescribed by the ordinances of the corporation, which are directory, is not required. If the work has been done and in a manner satisfactory to the officer entrusted with its supervision, and has been received by the corporation and paid for, a *prima facie* case is made out. The defendant may show that there has been a neglect of duty on the part of the authorities entrusted with the execution of the work, and if this neglect or omission has injured him, such facts may constitute a defence.

*Appeal from Buchanan Court of Common Pleas.*

This was an action to recover one hundred and twenty-eight dollars and seven cents, the amount apportioned to the defendant as his share of the cost of macadamizing the street in front of his lot in the city of St. Joseph. The petition alleges the incorporation of plaintiff by the charter granted February 22, 1851; sets forth the amendment of the charter approved November 21, 1857, empowering it to macadamize the streets and directing that the cost thereof should be borne by the owners of the adjoining property, and apportioned and charged on the adjoining lots in proportion to their front in manner to be prescribed by ordinance. \* The

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\* Said amendment of the charter is as follows: "Sec. 1. The mayor and councilmen of the city of St. Joseph shall have power, within the city, to macadamize, pave, or otherwise improve and keep in repair, streets, alleys and avenues. Sec. 2. The cost of all macadamizing, paving, and repairing done in any street, alley or avenue, by order of the mayor and city council, shall be borne by the owners of the adjoining property, and shall be apportioned and charged on the adjoining lots in proportion to their front, in manner to be prescribed by ordinance, and shall be paid by the owners of such lots respectively; and the city engineer shall make out and hand to the city collector for collection, on the first Monday in May and November in each year, the accounts of such apportioned costs of the improvements made during the six months preceding, and the owners of the lots charged therewith shall be bound to pay said costs charged, like liabilities contracted by themselves, and may be sued therefor accordingly, and the lots or lands charged shall also be held by a lien for the respective apportioned shares of such cost, until the same, with all costs attending the collection, be fully paid; such lien may be enforced by a special tax, levy and sale, or also by proceedings at law, all according to such proceedings and in such manner as may be prescribed by ordinance; and any share of such cost, which shall not be paid at the time the same is made payable by ordinance, shall, until paid, bear and be chargeable with such rate of interest as the city council ordain, not exceeding, however, twenty per cent. per annum." (Sess. Acts, 1857, Adj. Sess. p. 249.)

petition set forth ordinances of the city passed under this amendment of the charter; that the city council ordered the macadamizing of the street in front of the defendant's lot; that the city engineer proceeded to let to contract said macadamizing agreeably to ordinance; that the street in front of defendant's property was macadamized; that the city engineer, under the authority of the charter and the ordinances of the city, apportioned and charged for such macadamizing to the defendant the sum of one hundred and twenty-eight dollars and seven cents; that this sum was apportioned in proportion to the front feet of the lot owned by him; that the city collector made demand of payment.

The defendant set up the unconstitutionality of the amendment to the charter, and put in issue the alleged compliance with the requirements of the ordinances of the city. At the trial the court excluded the said amendment to the charter on the ground that it was unconstitutional. The court also excluded the ordinances of the city passed under said amendment. The plaintiff thereupon took a nonsuit, with leave, &c.

*Hall*, for appellant.

I. The amendment to the charter authorizing the city to macadamize streets at the expense of adjoining property owners, and to apportion that expense according to the front feet of the adjoining property, is constitutional. (*Inhabitants of Palmyra v. Morton*, 25 Mo. 594; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495.) The court erred in refusing to admit evidence of the contents of the lost advertisement. Under the law the plaintiff had the right to have the streets macadamized and to make the adjoining owners of lots pay for the same. If the work were done in such way that the city was liable therefor, then it matters not whether it was let out to contract or not, nor whether it was done according to contract or not, still the city has the right to collect the money to pay for the work from the adjoining property owners. It is true, the law authorizes the city to do said work in such manner as the city ordinances prescribe, and the city ordi-

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nances require said work to be let out to contract. But the city ordinances also require such work to be done under the supervision of her engineer, and if that officer accepts the work so as to bind the city, then the work has been done according to law, although the city engineer may not have strictly performed his duties. The only question is, has the work been done so as to make the city liable to pay for it? If it has been so done, then the adjoining property owners must furnish the means of payment.

*Gardenhire*, for respondent.

I. The act of November 21, 1857, amending the charter of the city of St. Joseph is unconstitutional. It applies private property to public use without just compensation; authorizes property subject to taxation to be taxed, not in proportion to its value, but by the front foot, irrespective of value; and in effect substitutes the will of a municipal corporation for that of the real estate owner in improving his own private property. It is not within the case of *Lockwood v. City of St. Louis*, 24 Mo. 20, because the tax in that case was levied upon the application of a majority of the owners of real estate in the district to be drained, and was limited to one-half of one per cent. on the assessed value of the real estate; nor the case of the *Inhabitants of Palmyra v. Morton*, 25 Mo. 593, because but one of the objections mentioned was decided in that case—namely, that to make the owners of lots adjacent to a street pay for its improvement was no violation of the constitution, leaving the mode of distributing the tax among the owners, whether in proportion to value or by the front foot, untouched; nor the case of the *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, because in that case the amount was limited to so much per acre and was improved by the consent of the owners, each having a vote for every forty acres of land he had to be drained. There are but two grounds upon which it is insisted that the law in question is constitutional. One is that it imposes a tax upon benefits, and the other that property need not be taxed in proportion to value for local purposes. What benefits were taxed in

this case? Any conferred by the corporation? The lot owner was required to improve the street in front of his lot and pay for it. Its benefits, then, were conferred by himself. What is the difference between such benefits and benefits resulting from building a mill or making other improvements on the lot, so far as the question of taxation is concerned? The first the lot owner is forced to confer upon himself and incidentally benefits the public; the last he confers voluntarily, and without benefit to the public. But were the benefits direct and peculiar or general; (*Newby v. Platte county*, 25 Mo. 258;) and if general, could they be taxed? And could the corporation determine this—say, before the work was done—that the benefits would be direct and peculiar, and precisely equal to the cost of the work? If property need not be taxed in proportion to value for local purposes, then what is a local purpose? May a tax on property by the acre or foot be raised to build a court-house, a market-house? And what is the difference between these and a street? The petition is bad. (*Andrea v. Heinritz*, 19 Mo. 310.) The petition does not show that the work was let to the lowest bidder upon two weeks' notice, stating the nature of the work, the place where specifications might be seen, the time when bids would be opened, and that no bid would be received unless the person offering to take the contract enclosed with his proposal the obligation of himself and a responsible person binding themselves to pay to the city two hundred dollars in case the bidder should refuse to take the contract should it be awarded to him. These are among the requirements of the charter and ordinance, and are of substance, and must be shown to have been strictly pursued. The charter and ordinance constitute a power of attorney authorizing the corporation to act as the agent of defendant, and it must be shown to have been followed.

NAPTON, Judge, delivered the opinion of the court.

The principal point upon which this case is brought here has been several times before this court. In the case of In-

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habitants of Palmyra v. Morton, 25 Mo. 594, and Egyptian Levee Co. v. Hardin, 27 Mo. 495, and Gantt v. City of St. Louis, 25 Mo. 505, the question was discussed and determined. The judgment of the court of common pleas must therefore be reversed.

Upon the trial of this case, all the evidence offered by the plaintiff was excluded. This course was taken, we presume, upon the ground that the act of the legislature authorizing the city authorities of St. Joseph to cause the streets of the city to be paved at the expense of the proprietors of the adjoining lots was unconstitutional, and therefore all evidence to show that the plaintiff had followed the provisions of this act and the ordinances passed under its authority was regarded as nugatory by reason of the invalidity of the law. We consider it unnecessary therefore to examine the evidence in detail.

It is suggested, however, that the plaintiff must aver and prove a strict compliance with all the provisions of the ordinances which were passed by the city corporation to carry into effect the object of the law, and that unless it is shown that every requisition of the ordinances has been fulfilled the defendant is not liable. It can not be doubted that a substantial compliance with the law is essential to entitle the plaintiff to recover, but we are not inclined to think that the plaintiff need be prepared to prove that all the formalities which the city ordinances may prescribe have been observed. The object of these by-laws is to secure a faithful execution of the work and at fair prices. They are directory in their character. If the end is attained, it can not be of much importance how it has been reached. If the work has been done and in a manner satisfactory to the officer entrusted with its supervision, and has been received by the corporation and paid for, a *prima facie* case, we should think, is made out.

Undoubtedly, the defendant may show that there has been neglect of duty on the part of the authorities entrusted with the execution of the work, and if this neglect or omission

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has injured him, such facts may constitute a defence. But we can not anticipate the course which the case may take. We have thrown out these general suggestions, because of intimations from the counsel that such questions were likely to arise.

Judgment reversed and cause remanded. The other judges concur.

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REED, Appellant, v. LEFFINGWELL, Respondent.

1. Where in the case of an appeal from a justice of the peace the appeal bond affords ample security, it is improper to require the appellant to file an additional bond.

*Appeal from Crawford Circuit Court.*

This was a suit originally commenced before a justice of the peace on an account for twenty-two dollars and seventy cents. The defendant filed an offset amounting to twelve dollars. Judgment was rendered by the justice in favor of the defendant for twelve dollars, and costs. The plaintiff took an appeal to the circuit court. At the October term, 1859, of the circuit court an order was made requiring the plaintiff, appellant, to file an additional bond in the sum of two hundred dollars sixty days before the next term of the court. At the April term, 1860, on the third day of term, the plaintiff filed an additional bond, which was approved by the court. On the fourth day of the term the defendant moved the court to strike out said bond and dismiss the appeal, on the ground that the bond was not filed sixty days before the commencement of the term as was required by the order of the court. The court sustained the motion and dismissed the appeal. The plaintiff moved the court to set aside this dismissal and reinstate the cause on the docket. The plaintiff set forth in his motion that he was misled by the attorney of the defendant and induced to believe that

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the case would be compromised ; that he used due diligence and filed a bond as soon as he was informed of an order to that effect. This motion was supported by affidavits. In the affidavit of Reed an agreement was set forth purporting to have been executed by the attorney of the defendant, by which it was agreed that this suit should be discontinued, each party paying one-half the costs. The court overruled the motion.

*Edwards & Ewing*, for appellant.

I. The court erred in sustaining the motion of the defendant to dismiss the appeal. (R. C. 1855, p. 975, § 17, p. 441, § 2.) The plaintiff ought to have been permitted to file a new bond. The court erred in rendering judgment against the security in the appeal bond. The bond was entered into to obtain the appeal, and then when the appeal is dismissed it is error to render judgment against the securities. The sureties in a rejected bond are released and discharged from further liability upon the dismissal of the suit for the plaintiff's failure to file a new bond. (Hollinsworth v. Matthews et al., 19 Mo. 406.)

SCOTT, Judge, delivered the opinion of the court.

The record in this case contains a singular proceeding. It is a great deal better that courts should try causes on their merits than to be disposing of them on grounds which are foreign to the purposes of justice. We can not see why, under the circumstances of this case, a new or additional bond was required. The penalty of the bond was more than six times the amount in controversy. But what are we to think of the dismissal of the appeal for not filing this new bond within the time prescribed by the court, in the teeth of the affidavit of Reed, which shows how he was misled and deceived by the counsel of the defendant ?

Reversed and remanded. The other judges concur.

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Marmaduke v. Hannibal & St. Joseph Railroad Co.

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MARMADUKE *et al.*, Plaintiffs in Error, v. HANNIBAL AND ST. JOSEPH RAILROAD CO. *et al.*, Defendants in Error.

1. A bill of peace to quiet title can not be maintained where the title has not been called in question in actions at law in the nature of actions of ejectment.

*Error to Macon Circuit Court.*

This was an action against the Hannibal and St. Joseph Railroad Company and others to determine and quiet the title to several pieces of land. Plaintiffs, as appears from the petition, claim title to said lands as a portion of the swamp lands given to the state of Missouri by act of Congress of September 28, 1850, and granted by the state to Macon county by act of March 3, 1851, and acquired under the county by plaintiffs. The Hannibal and St. Joseph Railroad Company claimed to own said lands under act of Congress of June 10, 1852; and of the state, of September 20, 1852. Plaintiffs set forth that the Hannibal and St. Joseph Railroad had mortgaged said lands to defendants and were trying to sell them. Plaintiffs prayed for an injunction against the sale of the lands.

*Prewitt*, for plaintiffs in error.

*Lamb & Lakenan*, for defendants in error, cited 28 Mo. 211.

EWING, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill of peace, and the case is not distinguishable from that of *Patterson & wife v. McCamant*, 28 Mo. 211.

Judgment affirmed; the other judges concurring.

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Grannahan v. Hannibal & St. Joseph Railroad Co.

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GRANNAHAN, Respondent, v. HANNIBAL AND ST. JOSEPH RAIL-  
ROAD COMPANY, Appellants.

1. Justices of the peace have jurisdiction of actions brought by laborers against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.)
2. The twelfth section of the general railroad act is constitutional in its application to railroad corporations previously created.
3. Although a contractor under a railroad company may sublet to another, and bind such sub-contractor not to give out his contract to another, yet if such sub-contractor should violate this agreement and give out the contract to another, a laborer under the latter could maintain an action under the twelfth section of the general railroad act against the railroad company.

*Appeal from Macon Circuit Court.*

This was an action commenced before a justice of the peace under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) The plaintiff had performed work in the construction of the Hannibal and St. Joseph Railroad, under McCormick, Knight & Riley, who were contractors under Terrill & Reed, who were contractors under J. Duff & Co., the original contractors. Notice to the company was served on the engineer of McCormick, Knight & Riley.

*Lamb & Lakenan*, for appellant.

I. The court should have dismissed the suit. The justice of the peace had no jurisdiction to try suits against a railroad corporation. No such jurisdiction is conferred by the charter of the road. The twelfth section of the general railroad act confers no such jurisdiction. That section substitutes one debtor for another and directs the necessary steps to be taken in order to enforce the right, but nowhere speaks of jurisdiction. In cases of penalties justices have jurisdiction expressly given by said act. (Sec. 51.) The court erred in refusing to permit defendant to prove that prior to the passage of the railroad law, defendant had contracted with John Duff & Co. for the entire construction and completion of the work; that said contract was subsisting at the

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time plaintiff performed the labor sued for; that said work was being done under said contract. No law subsequently passed could affect the contract between the railroad company and Duff & Co. It is not competent for the general assembly to pass any law impairing the obligation of contracts. If the said twelfth section be applied to companies previously organized and to contracts made by such companies for the construction of their roads prior to such general law, it would work wrong and hardship; it would materially interfere with and impair the obligation of such contracts. (See *Peters v. St. Louis and Iron Mountain Railroad Co.*, 23 Mo. 112.) If plaintiff is permitted to recover, defendant will be compelled to pay twice for the same work. The company could not indemnify itself against the parties with whom it contracted. Its contract was already made. The court erred in refusing to admit evidence to prove that *Therrill & Reed* were expressly prohibited from subletting the work. It was for work done under *Therrill & Reed* that notices should have been served and not for work done under *McCormick, Knight & Riley*.

*Ryland & Prewitt*, for respondent.

I. The justice had jurisdiction of the cause. (*Mooney v. Hannibal & St. Joseph Railroad Co.*, 28 Mo. 570.) The fact that the charter of the company was granted before the passage of the general railroad act does not prevent plaintiff from recovering. (23 Mo. 110.) It can make no difference that the contract with *Duff & Co.* was also made prior to the passage of said act. The labor was performed after its passage. It did not appear that the company had paid *Duff & Co.* before this suit was brought. Being bound by the notice, the company could have pleaded it in bar to a suit brought by *Duff & Co.* If defendant was liable when the suit was commenced, it could not release itself by paying other parties, and thereby causing plaintiff to lose his money. If any injury resulted to *Duff & Co.* from the violation of the agreement not to sublet, they had their remedy against

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Grannahan v. Hannibal & St. Joseph Railroad Co.

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Therrill & Reed. The sub-contract is valid. No such provision could affect the laborer.

Scott, Judge, delivered the opinion of the court.

In the case of *Mooney v. Hannibal and St. Joseph Railroad Co.*, 28 Mo. 570, it was held that, under the twelfth section of the general railroad law, (R. C. 1855, p. 414,) justices of the peace had jurisdiction of suits brought by laborers on the roads against the railroad companies.

It is objected to the claim of the laborer that the company was not permitted to give in evidence the fact that it had contracted with Duff & Co. to do the work on the road before the passage of the general railroad law; consequently, that it could not indemnify itself against claims of the laborers it might satisfy, as, at the time of the contract with Duff & Co., it could not be aware that there would be any. It was competent to the general assembly to pass the law. (*Peters v. St. Louis and Iron Mountain Railroad Co.*, 23 Mo. 112.) If the law was binding, then the company might have paid the laborers, and withheld the amounts paid from the contractors, who would know that by law their employees had a recourse against the company in the event of their failure to pay for their services. Under such circumstances, the sums paid by the company would be a fair set-off against their contractors; nor would this be any violation of the contract between them and the company. The principle involved in this law lies at the foundation of all our enactments in relation to garnishments. No one supposes that a law authorizing the garnishment of a debt contracted previously to the passage of the law would be unconstitutional.

Duff & Co. contracted with the company to build the road. They sublet their contract to Therrill & Reed and bound them not to give out their contract to any others. If they, in violation of this agreement, did sublet the contract, the sub-contractor would be the agents of Therrill & Reed; and if they performed the work as it was to have been done, Therrill & Reed would be bound to them for the price. Duff

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& Co. might have sued for a violation of the agreement not to sublet. But if they acquiesced and the work was done by the sub-contractors of Therrill & Reed, what damage would have been sustained? Why did not Duff & Co. interfere and prevent the last sub-contractor from doing the work, if they wished to take advantage of the agreement not to sublet? Affirmed. The other judges concur.



CONNER, Respondent, v. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. Grannahan v. Hannibal and St. Joseph Railroad Company, ante, p. 546, affirmed.

*Appeal from Macon Circuit Court.*

*Lamb & Lakenan*, for appellants.

*Ryland & Prewitt*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This is decided by the opinion in the case of Grannahan against the same defendants, delivered at this term.

Affirmed. The other judges concur.

[END OF JULY TERM.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,

OCTOBER TERM, 1860, AT ST. LOUIS.

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HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Plaintiff in  
Error, v. SHACKLETT, Defendant in Error.

1. The exemption of the stock of the Hannibal and St. Joseph Railroad Company from all state and county taxes, contained in the original charter of said company, is modified by the acceptance on the part of said company of the act of September 20, 1852; (Railroad Laws, p. 115; Sess. Acts, 1853, p. 15;) and the corporate property of said company, although representing the stock, is subject to taxation at the time and in the manner specifically provided for in the third section of said last mentioned act.
2. The road-bed, machinery and depots of the Hannibal and St. Joseph Railroad, and the other property used by said company in operating its road, are to be considered as part of and represented by the capital stock of said company, and are not liable to taxation under that provision of the general revenue law subjecting to taxation "all property owned by incorporated companies over and above their capital stock." (R. C. 1855, p. 1322.)

*Error to Marion Circuit Court.*

This was a suit brought by the Hannibal and St. Joseph Railroad Company to recover back the sum of six hundred and fifteen dollars and eighty-six cents paid by the plaintiff

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to the defendant Shacklett as tax collector of Marion county, being the amount of state, county and asylum taxes levied and assessed on the property, real and personal, belonging to plaintiff in Marion county in the year 1858. The plaintiff sets forth in its petition the various pieces and kind of property taxed, consisting of the road-bed, depot, machine shops, machinery and rolling stock, &c., and the assessed value of each and the amount of the taxes assessed; that all the property taxed was used and necessary to operate its road; that said property was exempt from taxation; that the assessment was illegal and void; that the collector demanded said taxes of plaintiff, and upon plaintiff's refusal, levied upon and seized personal property of plaintiff and was about to sell to make the tax; that to prevent a sale plaintiff paid said tax under protest.

The court sustained a demurrer to this petition.

*Leonard, Lamb and Lakenan*, for plaintiff in error.

I. It is manifest from the provisions of the revenue act that all corporate property shall be taxed but once, that none shall be doubly taxed. The road-bed, ties, rails, and other fixtures, together with the rolling stock necessary to the working of the road and actually used for that purpose, form part of the capital stock within the meaning of the provision of the revenue act. The capital stock is not merely the representative of this property, but it is this very property that constitutes the capital stock. (12 Gill & Jo. 117; *Gordon v. City of Baltimore*, 5 Gill, —; *Rome Railroad Co. v. Rome*, 14 Georg. 275; *The State v. Branniso*, 3 Zabr. 485; *State v. Bentley*, id. 540; *State v. Ferris*, id. 546.) When the law subjects the stock, *eo nomine*, to taxation, the road-bed and necessary appendages are by construction excepted out of the words of the general law. (*B. & P. R. R. Co. v. Harris*, 21 Mo. 533; *Salem Iron Factory v. Inhabitants of Danvers*, 10 Mass. 518; *Smith v. Burley*, 9 N. H. 427.) All this is upon the principle that the capital stock represents the real and personal property that is

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necessarily and permanently employed in carrying on the business for which the company was incorporated. There should be no double taxation.

*Dryden & Lipscomb*, for defendant in error.

I. If plaintiff relies upon any thing in the charter exempting its property from taxation, then the charter should have been pleaded. There is nothing in the charter giving the exemption claimed. It is not exempted by the provision contained in the twenty-fourth section of the charter of the Louisiana and Columbia Railroad Company, to the effect that the "stock of said company shall be exempt from all state and county taxes." This is an exemption from taxes on "stock." This exemption was for the benefit of the stockholders rather than the corporation. This exemption was not, therefore, one of the privileges, rights or immunities conferred by the charter of plaintiff. There is no consideration for the exemption if it existed, and it was subject to repeal. The provisions of the revenue law of 1855 distinguish between *capital stock* and *property* of the corporation.

NAPTON, Judge, delivered the opinion of the court.

The question in this case is whether the property of the Hannibal and St. Joseph Railroad Company in the county of Marion—consisting of the road-bed, depot, cars, locomotives, and all the real and personal property necessary for the operations of the road—is liable to taxation under the general revenue law of the state.

That law, among other objects of taxation, enumerates "shares of stock in banks and other incorporated companies, excepting manufacturing companies, the property of which alone shall be taxed;" and "*all property owned by incorporated companies over and above their capital stock.*" Under this last clause, the assessor of Marion county, under the direction of the county court, assessed the tax in question for state and county purposes.

The charter of this company was granted in 1849. The

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act of incorporation adopted the provisions of an act to incorporate the Louisiana and Columbia Railroad, which had been passed by the legislature in 1837. In the twenty-fourth section of this last named act is a clause declaring that "every person who shall cease to be a shareholder shall also cease to be a member of said company; and the *stock of said company shall be exempt from all state and county taxes.*"

In 1852, September 20, an act was passed to give this company the benefit of the donation of lands made by Congress during the same year. The third section of this law is as follows: "In consideration of the grants and privileges herein conferred upon said company, the said company shall, on the first Monday in December of each year, after said road is completed, opened and in operation, and declares a dividend, pay into the treasury of the state a sum of money equal to the amount of the state tax on other real and personal property of like value, for that year, upon the actual value of the road-bed, buildings, machinery, engines, cars and other property of said company, which shall be as a consideration to the state for the execution of the trust reposed in the state by an act of Congress of the United States, approved June 10, 1852, entitled 'An act granting the right of way,' &c.; and for the purpose of ascertaining the value of the same, it shall be the duty of the president of said company, on the first day of February in each year after said road is completed, opened and put in operation, and declares a dividend, to furnish to the auditor of the state a statement under his oath, made before and certified by some officer authorized to administer oaths, the actual value of the road-bed, buildings, machinery, engines, cars and other property of said company; and from said statement so furnished the auditor shall charge said company with the amount appearing to be due the state, according to the statement furnished, as herein required, by the president of said company; and in case said company shall fail to pay into the state treasury, within thirty days after the first day of December in each year, the amount charged against said company as aforesaid,

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said company shall forfeit and pay to the state of Missouri, in addition to the sum with which said company stands charged by the auditor, ten per cent. per month on the amount charged to said company ; which sum charged against said company, together with the ten per cent. per month hereinbefore specified, may be recovered in the name of the state of Missouri, by civil action, in any court of competent jurisdiction. And should the president of said company fail to make out and furnish to the auditor of the state a statement as herein required, said company shall forfeit and pay to the state ten thousand dollars for each failure, which may be recovered, in the name of the state of Missouri, in any court of competent jurisdiction : *Provided*, that if said company shall fail, for the period of two years after said road shall be completed and put in operation, to declare a dividend, that then said company shall no longer be exempt from the payment of said sum of money in this section required to be paid into the state treasury on the first Monday in December of each year by said company, nor from the forfeitures and penalties in this section imposed." (Railroad Laws, p. 116.)

The act of December 25, 1852—which was passed for the purpose of applying a portion of the same donation of Congress to the Pacific Railroad Company—contains this provision : "The said Pacific Railroad and the said South-western Branch Railroad shall be exempt from taxation respectively until the same shall be completed, opened and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars and other property of such completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the state on either real or personal property of like value ; and for the purpose of ascertaining the value of the same, it shall be the duty of the president of said company, on the first day of February in each year after such road is completed, opened and put in operation, and declares a dividend, to furnish to the auditor of the state a statement, under his oath, made

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before and certified by some officer authorized to administer oaths, of the actual value of the road-bed, buildings, machinery, engines, cars and other property appertaining to said completed road; and from said statement so furnished the auditor shall charge said company with the amount appearing to be due to the state, according to the statement furnished as herein required by the president of the company; and in case said company shall fail to pay into the state treasury, within thirty days after the first day of December in each year, the amount charged against said company as aforesaid, said company shall forfeit and pay to the state of Missouri, in addition to the sum with which said company may stand charged by the auditor, ten per cent. per month, after the expiration of said thirty days, on the amount charged to said company; which sum charged against said company, together with the ten per cent. per month hereinbefore specified, may be recovered in the name of the state of Missouri, by civil action, in any court of competent jurisdiction; and should the president of said company fail to make out and furnish to the auditor of the state a statement as herein required, said company shall forfeit and pay to the state ten thousand dollars for such failure, which may be recovered, in the name of the state of Missouri, in any court of competent jurisdiction: *Provided*, that if said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, that then said company shall no longer be exempt from the payment of said tax, nor from the forfeitures and penalties in this section imposed." (Railroad Laws, p. 67.)

These sections in the two acts are copied to show the almost entire identity of language employed, with the exception that the last section expressly and in terms exempts the Pacific road from taxation, unless in the mode and at the time specified. It will also be observed, that the proviso to this section calls the amount due *a tax*, whilst the proviso in the section from the act concerning the Hannibal and St. Joseph Railroad does not use this term, but speaks of the

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amount as "a sum of money required to be paid into the state treasury;" and in the body of the section, it is said to be "a consideration to the state for the execution of the trust reposed in the state," &c. These acts were passed at the same session of the legislature—the one in September and the other in December. The act relating to the Pacific Railroad was passed on the 25th of December.

Previously to the passage of these acts there was a provision in the amended charter of the Pacific Railroad Company (Railroad Laws, p. 24) declaring that "the capital stock [of the Pacific Railroad Company], together with all machines, engines, cars, &c., belonging to the company, together with all their works and other property, and all profits, &c., shall be vested in the respective shareholders of the company forever, in proportion to their respective shares," and providing that the same should "be deemed personal estate, and should be exempt from any public charge or tax whatsoever, for the period of five years from the passage of this act." This act was passed March 1, 1851, and the exemption has expired; but before its expiration—in 1852, as we have seen—the property of this company had been exempted from taxation, except in a mode and at a time particularly specified in the section which we quoted at large from the act of 1852.

The sixth section of the amended charter of the North Missouri Railroad Company (January 7, 1853, Railroad Laws, p. 35) contains precisely the same provision, exempting the capital stock and all the property of the road from taxation for five years, which has been copied from the amended Pacific Railroad charter.

The act to confirm the incorporation of the Cairo and Fulton Railroad Company, &c., passed February 20, 1855, contains the same exemption from taxation to be found in the twelfth section of the act of December 25, 1852, concerning the Pacific road, which has been heretofore copied. The ninth section of the act concerning the Cairo and Fulton Railroad Company (Railroad Laws, p. 57) is almost a literal copy of the twelfth section above referred to, and of course

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exempts, beyond all doubt, all the property of this road from taxation, except in the mode pointed out.

The amended charter of the St. Louis and Iron Mountain Railroad Company contains a provision (Railroad Laws, p. 48, § 5,) that the engines, cars, and other property of this road "shall be deemed *a part of the capital stock* of said company," &c.; and the act incorporating the Platte County Railroad Company declares (Railroad Laws, p. 54, § 19,) that "the stock of said company shall be considered personal property," &c. There is nothing said in the two laws last mentioned concerning the exemption of the property of the companies from taxation.

Recurring to the general revenue law, which provides for taxing "all property owned by incorporated companies *over and above their capital stock*," we propose to consider the proper construction of this provision in reference to the property of the Hannibal and St. Joseph Railroad Company. As the phraseology of the law is obscure, we have referred to the special acts touching the immunities and burthens of this company, as well as those concerning the other leading railroad companies in the state, with a view to reach, if possible, the intent of the legislature. Where an exemption from taxation is claimed by a corporation of property which clearly falls within the descriptive words of the act which imposes the tax, there can be no question that the exemption must be a plain one. The presumption is against the corporation, if the property be such as would be manifestly subject to taxation without a special exemption. But when it is doubtful whether the property proposed to be taxed falls within the terms of description used by the law, it is altogether consistent with the rules of construction to resort to other statutes, more specifically appropriated to the subject, for the purpose of ascertaining the intention of the legislature in the enactments of the general statute.

What description of property was intended to be embraced by the words "all property owned by incorporated companies over and above their capital stock," it must be conceded,

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is not very plain, especially when made applicable to railroad corporations. The difficulty is not diminished by taking into consideration the additional provision, which enumerates "shares of stock" as another subject of taxation. It is certainly implied that capital stock is to be regarded as property, and that a corporation may have more property than the capital stock represents. It is not designed that the property which is represented by capital stock shall be taxed, but the property which is owned *over and above* the capital stock. How this is to be ascertained, how the assessor is to know what property represents the capital stock, and what property has been obtained by the profits or income arising from the capital, is not pointed out. It is clear that there was no intention of taxing both the capital stock and the property which was over and above the capital stock. It is only the last which is taxed, and the former is expressly exempted.

Confining ourselves entirely to the railroad corporation whose property has in this case been subjected to taxation, without undertaking to give any construction to the law with reference to corporations of a different character, the question is, upon this provision of the general revenue law, whether the road-bed, machinery, depots, and other property used by the company in operating the road, are to be considered as a part of the capital stock of the company. It is undoubtedly not literally the capital stock, taking these words in their usual acceptation. Capital stock, in its strict signification, exists only nominally; the money or property which it represents is the tangible reality. The one is the representative of the other; and if the stock and the property it represents are both taxed, the taxation is double.

The legislature seems to have given what may be termed a legislative interpretation of these words "capital stock," so far as they are applied to the various railroad companies of the state. We find in the charter of the St. Louis and Iron Mountain Railroad Company a declaration that the road-bed, machinery and other property of that company shall be

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deemed a part of the capital stock of the company; and in the amended charter of the Pacific Railroad Company the "capital stock, together with all machines, engines," &c., are declared vested in the shareholders forever. Similar declarations are to be found in nearly all the acts incorporating the various railroad companies of the state, although there is nothing of the kind in any act regulating the Hannibal and St. Joseph Railroad Company, so far as we have been able to observe. These sections, however, show the general understanding of the legislature as to the identity of the property of the railroad companies necessary to the operation of their roads, with their capital stock.

But the third section of the act concerning the Hannibal and St. Joseph Railroad Company, passed in 1852, puts the solution of the question involved in this case, we think, beyond controversy. This section is not framed with the care manifested in the corresponding provision of the act of the same session concerning the Pacific Railroad Company. There is no express exemption from taxation of the property of the Hannibal and St. Joseph Railroad Company as there is in the twelfth section of the act concerning the Pacific Railroad Company. But it is difficult to see how the express exemption of the one can be any stronger than the implied exemption of the other, nor can we discover any motive for a discrimination between the two companies. At the expiration of two years from the completion of the Hannibal and St. Joseph Railroad, the road-bed, machinery and all the property of this company, employed in the operations of the road, are expressly subjected to a tax, the amount of which is to be regulated by the general revenue law of the state, and the mode of its assessment and collection is specifically pointed out. If a failure to pay the tax occurs, a heavy per cent. is added to the amount, and if the property is not valued as directed, and the valuation furnished to the auditor, a penalty of ten thousand dollars is inflicted on the company.

When the legislature declare that at a certain period

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property shall be taxed, it is in effect a declaration that prior to the designated time it shall not be taxed. Is it at all consistent with any rational probabilities, that when the legislature were framing particular provisions looking to the taxation of this company at a period subsequent to the date of the enactment, they also intended that the same property then prospectively taxed, should be subject to the same taxation and for the same purposes in the various counties through which the road passed? Does not the whole provision imply, as strongly as words can do, that the property enumerated was not within the general revenue law? If it was, the entire section is a piece of folly, an unmeaning superfluity; unless, indeed, it could be inferred that the object was to tax the same property in two modes—one by the assessors and collectors of the several counties—the other through the agency of the state auditor and the officers of the company. But this hypothesis is just as inconsistent with the tenor and spirit of the enactment as the other. A double taxation on the same property is manifestly not intended either by this enactment or by the provisions of the general revenue law. A double taxation is an absurdity, at least, where the proceeds of the tax go in one direction, since it is in effect an increased rate of taxation merely, and could be more plainly and simply expressed by making it so in terms.

The exemption of the stock of the Hannibal and St. Joseph Railroad Company from all state and county taxes, contained in the charter of 1849, must be considered as modified by the acceptance on the part of the company of the act of September 20, 1852, and their corporate property (although representing the stock) is subject to taxation at the time and in the manner specifically provided for in the last mentioned act.

The judgment is reversed and the cause remanded. The other judges concur.

PINNEO *et al.*, Respondents, v. HART *et al.*, Appellants.

1. A general assignment made by a debtor for the benefit of his creditors is not entirely invalidated by the fact that some of the claims are fictitious and fraudulent, and known to be such by the assignee; the participation of the assignee in the fraud contemplated by the debtor furnishes no obstacle to the enforcement of the rights of the *bona fide* creditors. If the assignee is disposed to promote the fraudulent purposes of the grantor, he may be displaced and another appointed. The fraudulent claims can be contested as well in the administration of the effects by the assignee, under the orders of the court, as in a suit by an attaching creditor.
2. Such a deed of assignment would not, under such circumstances, be void, although all the honest creditors should repudiate it.

*Appeal from St. Louis Court of Common Pleas.*

On June 26, 1854, the plaintiffs, members of the firm of Pinneo & Co., commenced a suit by attachment against Eugene Fribourg, and summoned the defendants Hart & Jecko as garnishees. As the ground of attachment the plaintiffs charged that Fribourg had fraudulently concealed and disposed of his property and effects so as to hinder and delay his creditors. Fribourg filed a plea in the nature of a plea in abatement. On the trial of the issue thus raised there was a verdict for plaintiffs. As between the plaintiffs and the garnishees the case turned upon the validity of a certain deed of trust dated June 7, 1854, by which Fribourg and his wife conveyed to the garnishees a certain stock of millinery goods, for the benefit, first, of certain creditors named in a schedule B. annexed to the assignment; and secondly, of certain creditors named in schedule C. thereto annexed. The plaintiffs in their allegations set forth that the indebtedness set forth in the schedule B. was false, fraudulent and fictitious; and that the conveyance was fraudulent and made with intent to hinder and delay creditors, of all of which the assignees had notice. The garnishees took possession of the goods and sold them and had the proceeds (\$1,465.20) thereof in their hands when they were summoned. The preferred creditors in schedule B. in the deed of assignment were Louis Block,

father of Mrs. Fribourg, for \$1,150, borrowed money; Emanuel Block, brother of Mrs. Fribourg, for wages, \$300; Delphine Block, sister of Mrs. Fribourg, for wages, \$300. Schedule C. was a list of genuine creditors, New York merchants. Evidence was adduced showing that the claims set forth in schedule B. were fictitious and fraudulent, and tending to show that the assignees were cognizant of their fictitious character. The plaintiffs were among the creditors named in schedule C. None of said creditors named in schedule C. ever presented their claims for allowance. Some of them sued Fribourg by attachment and summoned Hart & Jecko as garnishees.

The court, of its own motion, gave the following instructions: "1. If the jury believe from the evidence that the preferred debts mentioned in schedule B. in said conveyance of June 7, 1854, were not real and *bona fide*, but were sham and pretended debts, and if Fribourg made and contrived the said conveyance with the fraudulent intent to hinder, delay or defraud his real creditors in the collection of their demands; and if, also, the garnishees, Hart & Jecko, at or before the time said conveyance was made, had notice of the said fraudulent intent of Fribourg; and if, moreover, the jury further find that the creditors mentioned in schedule C. in said conveyance, dissented from and repudiated it, then the jury, if they find all the above facts to be true, will find a verdict for the plaintiffs. 2. The court further instructs the jury that, notwithstanding part of the debts secured by said conveyance were fraudulent and fictitious, and notwithstanding Fribourg made and contrived the same with the fraudulent intent to hinder, delay or defraud his creditors, they will find for the defendants (the garnishees,) unless they also find the defendants were privy to or had notice of the fraudulent intent of Fribourg, at or before the time the conveyance was made."

The court, at the instance of the plaintiff, instructed as follows: "1. In order to bring home to the defendants, Hart & Jecko, notice of the fraudulent acts and intentions of

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Eugene Fribourg, positive and direct testimony is not indispensable ; it is sufficient if the evidence satisfies the jury that the execution of the said conveyance was attended with and surrounded by such manifestly suspicious acts and circumstances, as that any man of ordinary intelligence and observation must have known that it was being executed for a fraudulent, and not for an honest purpose. 2. It is not necessary that fraud should be proved by direct and positive testimony ; but it is sufficient if from all the facts and circumstances the jury are satisfied that it existed."

The following instructions asked for by defendants were given : "1. The records of the suits of Pinneo and others against Fribourg and wife, read in evidence, ought not in anywise to be considered by the jury in this case as evidence of any notice to the garnishees of fraud in the grantors to the deed read in evidence. 2. Unless the jury shall believe from the evidence that the deed read in evidence was made for the purpose of fraud, and not for the purpose of securing a *bona fide* indebtedness ; and that the garnishees in this case, at the time of said conveyance, had notice of such evil and wrongful purpose on the part of the grantors, they ought to find for the garnishees. 3. The deed read in evidence is *prima facie* evidence of the debts therein named, and unless contradicted or successfully impeached by evidence, is proper and competent evidence before the jury of said debts. 4. If the sole purpose of the conveyance read in evidence was the discharge of honest debts, due at the time by the grantors, then said deed is not fraudulent, notwithstanding such conveyance may have had the operation of delaying the creditors of the grantors."

The court refused the following asked by defendants : "1. If the deed read in evidence was made to the garnishees to secure the payment of *bona fide* debts, due by the grantors to third parties, this constitutes a valuable consideration, in itself sufficient to pass the property to the garnishees in trust for the said creditors, and the same is not subject to garnishment in this case. 2. Unless the jury shall believe

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from the evidence that, before or at the time of the execution of the deed read in evidence, the garnishees in this case had notice that the said conveyance was made for the purposes of fraud, and that said deed was so made for the purposes of fraud with said notice to said garnishees, they ought to find for the garnishees. 3. A person in embarrassed or insolvent circumstances has a perfect right to convey his property for the benefit of part of his creditors to the exclusion of others; and if they shall believe from the evidence that the deed read in evidence was made by Fribourg and wife for the purpose of first securing the persons named in schedule B., and that at the time of said conveyance the grantors in said deed honestly owed said persons mentioned in said schedule, and that the principal object of said deed was for the purpose of paying them, then said deed is not fraudulent, but good in law, and the jury ought so to find. 4. If the jury shall believe that at the time of the execution of the deed read in evidence the grantors were indebted unto the persons named in schedule B. as therein alleged, and that said deed was made for the purpose of first securing them, then the proceeds in the hands of the garnishees is properly applicable to the payment and discharge of said debts, and is not subject to garnishment in this case, and the jury ought so to find."

The jury found for plaintiffs.

*Hamilton*, for appellants.

I. The case made by the plaintiffs, in their allegations, is simply this: A. makes a deed of trust to B., for creditors named in schedules Nos. 1 and 2. Those in No. 1 are alleged to be fraudulent, whilst those in No. 2 (amongst whom are the plaintiffs) are unquestioned; and not only is nothing alleged from which it can be inferred that the trust is terminated, but on the contrary, what is stated (and which stands admitted by the answer) is a technical admission that it still continues—"nothing having been done by the assignees under the statute." The plaintiffs charge the assignees with

notice that the debts mentioned in schedule No. 1 were fictitious and fraudulent. The question then is, do these facts, viz., the fraudulent preferences, and notice thereof on the part of the assignees, entitle the plaintiffs to the whole of the funds in the hands of the assignees, to the exclusion of the other creditors in schedule No. 2? The case falls entirely within the principle of *Hardcastle v. Fisher*, 24 Mo. 70. There, it is true, the assignees had no knowledge of the fraud; but no reliance was placed upon that circumstance. There were creditors who were guilty participants, and hence the question came fairly up, whether the maxim, "void in part, void in toto," should be adhered to. The court discriminated between the innocent and guilty parties to the transaction, and the fact that there were fictitious claims put into the assignment by the contrivance of the assignors and those supposed to be creditors, presented no obstacle to the enforcement of the trust for the benefit of the honest parties. The decision is based as well upon our assignment law as upon the authorities cited, and leaves no doubt but that the result would have been the same had it been shown that the assignees participated in the fraud. To the cases cited and approved by the court may be added: 1 *Smith*, N. J. 124; 9 *Pick.* 176; 14 *Ala.* 559; 16 *ib.* 568; 18 *Ark.* 138; 6 *Humph.* 514; 7 *Wheat.* 557. The position that notice by the assignee of the fraudulent conduct of the assignor will vitiate the assignment, derives no support from *Gates v. Labeaume*, 19 Mo. 28. There, as here, the proceedings were against the signees (who were not creditors), as garnishees. Two questions arose: 1, whether the deed was fraudulent on its face, and 2, whether the facts in proof made it void as to the assignees and creditors of the assignor. The court having answered the first question in the negative, conclude that the evidence did not connect the assignees with any fraudulent act of the assignor, and add: "The property was vested in them for the benefit of persons who are not to be affected by any act of Claverdetscher (the assignor) without their know-

ledge." Since these decisions there is no ground for saying that an inquiry into the conduct and motives of the assignee can be at all material, except where he is himself a creditor and then only to the extent of his claim. Such were the cases of *Stewart v. Wimer* (not reported), and *Wise v. Wimer*, 23 Mo. 238. Both were actions of trespass by the assignee, for an illegal seizure of the property assigned; in both the assignee was a creditor. The court say: "Fraud must be brought home to the assignee to make the assignment void, so far as his rights are concerned. In order to affect the assignee he must be charged with complicity in the fraud of the assignor." In the present case the assignees are mere volunteers, with no substantial interest under the deed, taking only the technical title. They are in no sense the agents of the assignors, but hold for the benefit of the creditors. Being merely nominal and not real parties, no act of theirs, unknown to those beneficially interested, will be allowed to break up the trust, or deprive them of its benefits. The creditors are not mere volunteers, and a valuable consideration and *bona fides* on their part will be taken to supply both those qualities in the assignees. Certain general principles are invoked on the other side. Thus, it is said that "by the general law the selection of an insolvent or incompetent assignee, or one who was privy to the fraud of an assignor, or entirely subservient to his will, rendered the assignment fraudulent and void;" and for these several positions, *Burrill on Assignments*, p. 66, 67 is cited. The reference as to the effect of the assignee's participation in the fraud is clearly a mistake; and it will be found on an examination of the authorities that the cases range themselves into two classes; according to the one of which, fraud on the part of the assignor alone vitiates the whole trust; but the other upholds the transaction, unless it be shown that the beneficiaries concurred in the fraud. According to neither is the intent of a mere volunteer assignee a material inquiry. So, too, whether the assignee be insolvent or incompetent,

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whether he may be supposed to be under the direct influence of the assignor or not, the creditors are sufficiently protected by the bond and security which the statute requires, and they can at all times enforce obedience to the law. Again: it is said that the assent of creditors will not be presumed where the deed is fraudulent, even where the assignee was not a party to the fraud. The answer is, that neither the title of the assignee nor the rights of creditors depend upon any formal act of assent. Creditors can only take by proving up their claims under the statute. Our assignment law ought to control this question. Whether the assignees are regarded as trustees appointed by contract or in any sense official trustees, their authority and duty are clearly defined by statute; and they are subject to the supervision and control of the court. So long as there are honest creditors, those duties remain whether fraudulent debts are set up or not. The legislature anticipated the presentation of unfounded claims, and, as far as practicable, have guarded against them; and the court can dismiss assignees for improper conduct. In view of our statute, there is a peculiar difficulty in saying that mere notice on the part of the assignee, that a fictitious claim is inserted into the schedule handed in by the assignor, necessarily and conclusively stamps him as a participant in the fraudulent scheme, and that it can have the effect of breaking up the trust. He is to require proof of all claims presented to him for allowance. His knowledge that a particular claim is unfounded may be perfectly consistent with an intention on his part, in the fair and honest discharge of his duties under the law, finally to challenge and reject it. Nor is the matter confided to him alone, for any party interested may have it referred to a jury. The true rule, then, in a case such as this, we submit, is, to regard the title as in the assignees, where the deed has vested it,—purge the trust by rejecting the unfounded claim, and administer the fund for the benefit of those justly entitled. The assignees were not, therefore, subject to the process

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of garnishment and should have been discharged on their motion.

*S. A. Bennett and Burke*, for respondents.

I. The instructions given by the court of its own motion were correct, even more favorable to the garnishees than the law warranted. They required the jury to find four facts before they could return a verdict for the plaintiffs: 1st, that the debts named in schedule B. were sham and pretended; 2d, that Fribourg made the assignment with fraudulent intent; 3d, that the assignees had notice of the fraud; 4th, that the creditors named in schedule C. had repudiated the deed. The first and fourth fact alone would have been sufficient. The assigned fund reverted in that case to the assignors and was subject to attachment. The first and third facts alone, or the second and third alone, would have enabled the plaintiffs to recover. If the assignees are privy to the fraud, the deed is absolutely void against an attaching creditor, even though other creditors, who have been less diligent in levying their attachments, may think it for their interest to let the assignment stand notwithstanding the fraud. (*Gates v. Labeaume*, 19 Mo. 17; *Hardcastle v. Fisher*, 24 Mo. 70; *Tatum v. Hunter*, 14 Ala. 557.) No title passes to the assignee as against any creditor. The decision of the assignees upon any claim is final unless, before it is made, some person interested shall request it to be referred to a jury. (Sec. 20.) That the assignees are privy to the fraud is not one of the reasons for which the circuit court is authorized by statute to remove them. (Sec. 23-4-5.) By the general law, the selection of an incompetent or insolvent assignee, or one who was privy to the fraud of the assignor or entirely subservient to his will, rendered the assignment void. (*Burrill on Assign.* 66, 67.) The instructions given at the instance of the plaintiffs are correct. (3 Myl. & K. 581; 11 Sm. & Marsh. 581; 2 Paige, 202; 17 Verm. 329; 9 Conn. 286; 4 Verm. 405; 1 Curt. 504.) The instructions asked by defendant and refused were properly refused.

NAPTON, Judge, delivered the opinion of the court.

Where a debtor makes a general assignment of all his property for the benefit of all his creditors, we are unable to perceive any reason for disturbing this disposition of his property, upon an allegation that some of the claims in the list of preferred debts are fictitious, and that the assignee was aware of their fraudulent character. How can the participation of the assignee in the fraud contemplated by the debtor furnish any obstacle to the *bona fide* creditors, since the control invested by our statute in the court over the entire administration of the trust? If the trustee is disposed to advance the fraudulent purposes of the assignor, he can be displaced and another substituted. If the assignor has put down fraudulent and fictitious claims in his schedule, they can be contested as well in the administration of the effects by the assignee, under the orders of the court, as in a suit by an attaching creditor. The only difference is, that the attaching creditor, if successful, sweeps away the whole fund, and a proper administration of it under the assignment distributes it equitably among all the creditors. Some intimations have been thrown out in one or two opinions of this court, from which it seems to have been inferred that a knowledge on the part of the assignee of the fraudulent designs of the assignor would let in the attaching creditor; but the cases did not turn upon the point. The judgment of the court in all the cases sustained the assignments; and although the observation is made that the fraud charged must be brought home to the assignee as well as the assignor to warrant the court in treating such assignments as nullities, yet, as the complicity of the assignees was not set up in these cases, the effect of it, if established, was not in question. (*Gates v. Labeaume*, 19 Mo. 17; *Wise v. Wimer*, 23 Mo. 238.) However this may be, as our statute law now stands in reference to this class of instruments, we see no propriety in allowing an attaching creditor to assail an assignment merely because the assignee is alleged to be a

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participator in the fraud. If he is, let the court, which has jurisdiction over the administration of the assignment, displace him and appoint another. It may be also observed, that it is not easy to see how the mere knowledge or suspicion of an assignee that some of the preferred claims enumerated in the assignment are fictitious, leads to an inference that he is disposed to promote the fraudulent purposes of the grantor. He may intend to disregard them, and administer the fund according to law ; but his purposes in relation to the trust confided to him are not important, except so far as they may influence the creditors to ask his removal. There is no necessity, in order to get rid of the assignee or of fictitious claims inserted in the deed, that the assignment should be annulled altogether, and the property left to the first attaching creditor or to a general scramble.

The judgment is reversed and the cause remanded. The other judges concur.



REDMOND (of color), Plaintiff in Error, v. MURRAY *et al.*,  
Defendants in Error.

1. An executory contract entered into by a master with his slave, by which the former agrees to manumit the latter upon the payment of a certain sum of money, is void and incapable of enforcement.
2. Slaves can be emancipated within this state only in the mode prescribed by statute.

*Error to Lewis Circuit Court.*

This was a suit by one Redmond, a man of color, against Edward C. Murray and Edward B. Osborn. Plaintiff set forth in his petition that on the 10th of January, 1855, he and his then master, Osborn, entered into a contract and agreement in writing, whereby said Osborn promised and agreed that if said plaintiff would pay said Osborn the sum of five hundred and fifty dollars and interest at ten per cent. from the date of a bill of sale held by said Osborn from one

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Conroy dated July, 1852, he (Osborn) would give said plaintiff his freedom; that, at the time of entering into said agreement in writing, plaintiff paid said Osborn the sum of five hundred and one dollars; that in August, 1855, he, through another, made Osborn a tender of the balance of said sum and the interest up to that date; that Osborn, disregarding his agreement, sold plaintiff to one Wigginton; that Wigginton sold him to the defendant Murray; that he is willing and ready to pay the balance to whomsoever may be entitled to the same; that in consideration of said agreement said Osborn gave him (plaintiff) his freedom for the space of some two years and six months; that plaintiff during that time was free to go wherever he desired; that therefore he was and is a free man, and that he is holden as a slave. Plaintiff asks "judgment for his freedom, and liberation, and for further relief," &c.

The following instrument accompanied and was made a part of the petition: "Lagrange, Mo., January 10, 1855. Received of Elijah Dehart and Remond the sum of five hundred and one dollars, it being a part of a sum of five hundred and fifty dollars, bearing ten per cent. interest from date of bill of sale held by said Osborn, which being paid he is to have his freedom. [Signed] E. B. Osborn."

The court sustained a demurrer to this petition.

*Glover & Shepley*, for plaintiffs in error.

I. The writing shows that the amount was paid by the slave and a third person. The reception of the money by a third person is a sufficient consideration for making of the agreement. If the contract has been fulfilled by said third person and the plaintiff, or either of them, by the payment or tender of the small remainder due, then the plaintiff, as the person beneficially interested, can ask to have the same enforced. The suit is a suit to declare that the defendants have no right to restrain plaintiff from his liberty; and any acts of defendants that would estop them in any suit from asserting a right, because it was inequitable for them to do

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so, are equally efficient in this suit as in any other. It is not true that a slave can be free only in the statutory way. Solemn acts of the owner, which are inconsistent with the idea that the person is a slave, will estop him from setting up such a claim; as when the owner has conveyed land, or made a devise to the person claimed to be a slave. (*Naylor v. Hays*, 7 B. Monr. 478; *Oatfield v. Waring*, 14 Johns. 188; *Hall v. Mullin*, 5 Harr. & Jo. 190; *Burke v. Gill*, 6 Gill & Jo. 138; *Durham v. Durham*, 26 Mo. 507.) Under the circumstances, it is inequitable to allow defendant to assert a right over the person of the plaintiff which he by writing or by act disclaimed to have. (5 Mart. 494.) Here is a great wrong which ought to be remedied in some manner.

*Wagner*, for defendants in error.

I. There was no valid or sufficient consideration alleged. The plaintiff being a slave, all his property belonged absolutely to his master; therefore he could pay nothing. (1 Stewart, 320.) All his acquisitions and earnings belonged to his master. (2 Rich. 424.) A slave can not enter into any binding contract with his master. (9 Gill & Jo. 19; 6 Rand. 173; 1 Leigh, 72.) The agreement set forth is void. The slave had no capacity to contract. A slave can not become partially free. (1 Pars. on Contr. 327.) There could be no emancipation without writing. Slaves can only be emancipated in the manner pointed out by statute. (R. C. 1478, p. —, § 1; *Wheeler's Law of Slavery*, 233; see *Charlotte v. Chouteau*, 11 Mo. 193.)

EWING, Judge, delivered the opinion of the court.

This was a suit for the specific execution of an alleged contract entered into between the plaintiff and the defendant Osborn, whereby the plaintiff was to be liberated upon the payment by him to Osborn, his then master, of a specified sum of money. The petition sets out the agreement, and avers the payment of the larger part of the stipulated sum and a tender of the balance with interest; that, after the

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payment of this sum, Osborn, in violation of this agreement, sold plaintiff to one Wigginton, who sold him to the defendant, Murray, as his slave; that in consideration of said agreement his then master, as plaintiff supposed, gave him his freedom for some two years and a half; and during that time he was free to go wherever he desired. He avers his readiness to pay the balance, and asks judgment for his freedom. The case is here on a demurrer to the petition.

There is no principle on which a court of equity could enforce a contract of this nature, which is not in conflict with the policy of our emancipation laws, and repugnant to the relation of master and slave, as it is recognized and protected by our legislature on the subject. The right claimed implies a legal capacity in the slave wholly incompatible with his *status* under our laws and the acknowledged rights of the master under that relation. The incapacities of his condition, as it respects any right to contract, to acquire and hold property, to be a suitor in our courts, and others of a like nature, suggest, at the threshold of the inquiry, insuperable obstacles to the specific enforcement of an executory contract between the master and himself looking to his future manumission, even where there might be a complete fulfilment on the part of the slave.

Provision is made whereby a negro may institute proceedings to establish his right to freedom when unlawfully detained in bondage, but it applies only to such as are entitled to freedom; and no action lies to enforce an executory contract by which a mere promise of liberation is given to the slave.

It is unnecessary to consider how far, if at all, the mere act of entering into a contract with a slave recognizes his power or capacity; or whether it would imply any renunciation of the master's dominion over him; for the power of the master himself is restricted by statute by certain prescribed forms by which such dominion can only be effectually renounced and his slave raised to the *status* of a freeman. The restrictions thus imposed are emancipation; and the

conditions on which the master's privilege in this respect may be exercised when viewed as a part of our legislative policy on the subject, can scarcely be reconciled with the right of the master to emancipate his slave in any other than the statutory mode—namely, by last will, or by an instrument of writing under seal. That any other is impliedly interdicted, we think, is manifest from a consideration of the several provisions of the emancipation act, and is the only view that would seem to be in harmony with the various legislative acts intended, it would appear, to guard more effectually the relation of master and slave, while it exists, and which also concern the condition of the negro himself after he passes from the hand of his master into a state of freedom. Such is the exposition given by their own courts of the laws of other states similar to ours. (*Dunlap v. Archer*, 7 Dana, 31; 8 B. Monr. 551; 2 Harr. & Jo. 176; *Weeks v. Cheer*, 4 Harr. & Jo. 543.) In the case last cited there was a petition to the chancellor to decree the recording of a deed of emancipation, which, by reason of the death of the master of the petitioner, had not been recorded within the time required for the recording of certain kinds of instruments. The court say the statute was not designed to give relief in cases which were before without remedy, by enabling a party acquiring equitable rights, under a deed not operative in law for want of recording, to perfect these rights by applying to the chancellor to order the original instrument to be recorded; but it was intended to give an accumulative remedy to persons able to contract, and who by deed acquire rights which equity will protect with the power to protect these rights. "But," he proceeds, "by the laws of this state a negro, so long as he is a slave, can have no rights adverse to those of his master; he can neither sue nor be sued, nor can he make any contract or acquire any rights under a deed which a court of law or equity can enforce; and as it is the recording of the deed of manumission within the time prescribed by law which entitles him to his freedom, he continues a slave until it is so recorded, and conse-

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quently can not go either into a court of law or equity for relief of any kind."

A court of equity can not enforce a promise by a master that he will emancipate his slave after a certain condition is performed, which condition has been complied with by the slave; as where, upon the purchase of the slave at an executor's sale, he is promised his freedom on the payment of his purchase money to his master. The jurisdiction of equity only extends to cases where the pauper has a *legal* right to freedom, but there is some impediment to the assertion of that right in a court of law. (*Sawney v. Carter*, 6 Rand. 174.)

Manumission is a mere gratuity under our laws, and a mere intention or promise by the master, not consummated in the manner pointed out by law, however solemn the form in which such promise may be made, can confer no power or capacity on the slave to have it enforced; it endows him with none of the attributes of a freeman; his condition or *status* is not in the least changed or affected in its legal relations; and there is nothing, therefore, of which the law can take cognizance, nor any ground on which the plaintiff can base his claim to relief, however strongly it might appeal, under circumstances of apparent hardship, to conscience or the moral sense.

Judgment affirmed; the other judges concurring.



THE TOWN OF PARIS, Respondent, v. FARMERS' BANK OF  
MISSOURI, Appellant.

1. By the thirty-second section of the first article of the act of the general assembly concerning banks and banking, approved March 2, 1857, (Sess. Acts, 1857, p. 22,) the banks were exempted from taxation for state purposes alone. The shares of stock in said banks, and the money and notes of other banks in their possession, are subject to taxation for local municipal purposes.
2. The town of Paris is authorized by its charter to tax for municipal purposes the money and bank notes of the other banks in possession of the branch at Paris of the Farmers' Bank of Missouri.

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Town of Paris v. Farmers' Bank of Missouri.

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*Appeal from Monroe Circuit Court.*

This was an agreed case between the town of Paris and the Branch of the Farmers' Bank of Missouri located at Paris, designed to test the question of the right of the former to tax the money and effects of the latter. The facts agreed upon are substantially as follows: The town of Paris was incorporated by an act of the general assembly approved November 19, 1855. (Sess. Acts, 1855, p. 172.) By the tenth section of its charter, the council of the town was empowered "to levy and collect taxes on all real and personal property within the town, not exceeding one-half of one per cent. upon the assessed value thereof." The Branch of the Farmers' Bank at Paris was established and went into operation in 1858. In April, 1860, the authorities of the town of Paris, by ordinance, levied a tax of one-third of one per cent. "upon all real and personal property within the corporate limits of said town," &c. Under the authority of this ordinance the proper officer assessed for the year 1860, against the defendant, on gold and silver coin and bank notes of banks other than defendant and belonging to defendant. The defendant refused to pay the tax assessed on the ground that said money and effects were not subject to taxation for town purposes. The court gave a judgment for the plaintiff.

*G. Porter*, for appellant.

I. The thirty-second section of the first article of the banking act was manifestly intended to exempt the banks from all other taxes or impositions in the shape of taxes, upon the condition that the one per cent. was annually paid into the state treasury. (See Angell & Ames on Corp. 260; 3 How. 133; 4 Pet. 514; 7 Pet. 514; 7 Ired. 55; 9 Yerg. 490; 2 Har. 80; 1 Zab. 557; 7 Dana, 342.) It can hardly be supposed that the legislature intended to give the town corporation power to tax objects exempt from taxation for ordinary public uses. The authority given to the plaintiff to levy and collect taxes did not empower plaintiff to levy and

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Town of Paris v. Farmers' Bank of Missouri.

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collect taxes from the moneys in the vaults of defendant. The provision of the revised code defining personal property to include money does not apply. It would be plainly repugnant to the intent of the legislature and the context of the same statute. Money is not the subject of "assessment," or "valuation." The charter was passed November 19, 1855, and the act giving the extended and arbitrary construction to the words "personal property" was passed December 6, 1855. The charter should be interpreted according to the rules in force at the time it took effect. Prior to 1845 money was not subject to taxation. By the terms of the town charter and the ordinances, money is not embraced as an object of taxation, but is excluded.

*C. D. Drake*, for respondent.

I. Exemptions from taxation are to be strictly construed. (State v. Newark, 2 Dutcher, 519; Indianapolis v. McLean, 8 Ind. 328; N. Y. & E. Railroad Co. v. Sabin, 26 Penn. Stat. 242.) The bonus prescribed in the thirty-second section of the banking law is in full of all taxes to be paid *the state*. The charter of the town of Paris authorized the town to levy a tax on all real and personal property within the town. This would include the property of the bank. Money and bank notes of other banks are personal property subject to taxation. Whether such money or notes were property susceptible of being assessed is not a question presented by the record. The charter was in existence when the banking law was passed. The right of the town to tax *all* personal property was not taken away. The exemption applies to taxes levied by the state.

EWING, Judge, delivered the opinion of the court.

This was an action to recover the amount of a tax levied by the town of Paris on money and bank notes in the possession of the Branch of the Farmers' Bank situated at that place, the notes being those of other banks.

The town charter empowers the council "to levy and col-

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lect taxes on all real and personal property within the town, not exceeding one-half of one per cent. upon the assessed value thereof." In the case of the Mayor of the City of Lexington et al. v. Aull, lately decided at Jefferson city, \* it was held that the thirty-second section of the first article of the general banking law of this state exempted the banks therein mentioned from taxation *by the state* only. This authority is decisive of the main questions involved in the case at bar. In that case the city authorities sought to levy the tax on the shares of stock held in the bank; in this, the tax was levied on money and bank notes only.

We think it is clear, that, under the provision of the town charter referred to, money and bank notes are taxable as personal property.

Judgment affirmed; the other judges concurring.

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FARRINGTON *et al.*, Respondents, v. MEEK *et al.*, Appellants.

1. Raftsmen engaged as such on the Mississippi river have, in the absence of any special limitations on their rights, a lien on rafts in their charge to secure the compensation due them as raftsmen.
2. Certain persons as raftsmen engaged at certain rates to run certain rafts from a point in the state of Wisconsin to any point on the Mississippi river between Dubuque and St. Louis that might be designated. The special agreement contained this further stipulation, that "the parties of the first part will furnish money enough to pay off the men within twenty-four hours after the delivery of the said lumber to market; the balance of the money to be paid after the lumber is sold and estimated or measured." Held, that the raftsmen had a lien upon the rafts for an amount sufficient to pay off at the point of destination the men employed by them; that the special contract overthrew the lien of the raftsmen only for so much of the contract price of transportation as exceeded the sum necessary to pay off the hands at the place of delivery.

*Error to St. Louis Circuit Court.*

This was an action to recover possession of two rafts of lumber alleged to be wrongfully detained by the defendants,

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\* See City of Lexington v. Aull, ante, p. 480.—[REP.]

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Meek and Clemens. The plaintiff gave a delivery bond and took possession of the lumber. The defendants in their answer admitted the ownership of the lumber by the plaintiffs, and set up a lien upon said lumber. It appeared in evidence that in February, 1858, the plaintiffs, the owners of two rafts of lumber, engaged the defendant Meek and one Burns to run and raft said lumber from Wisconsin to any point designated by the owners in the Mississippi river between Dubuque and St. Louis, or to either of these places. For one raft they were to receive five dollars per thousand feet, and for the other five dollars and fifty cents per thousand feet. The contract contained the following further provisions: "And it is further agreed by and between these presents that the parties of the first part will furnish money enough to pay off the men within twenty-four hours after the delivery of the said lumber to market; the balance of the money to be paid after the lumber is sold and estimated or measured; and the parties of the first part further agree to furnish money enough to get the said lumber over the rapids."

The arrival of the rafts at St. Louis was proven, and the refusal of the defendants to deliver them to plaintiffs. The defendants offered evidence with a view to show that the plaintiffs had not paid, in accordance with the contract, money sufficient to pay off the hands employed on the rafts.

The court, at the instance of the plaintiffs, gave the following instruction: "If the jury believe from the evidence that the plaintiffs were the owners of the lumber in question about the twentieth of May, 1858, and continued to own it until the institution of this suit; that after the 20th of May and before the institution of this suit plaintiffs by their agent demanded said lumber of said defendants, and that at the time of such demand defendants were in possession of said lumber and refused to deliver the same to the plaintiffs or their agent, and detained the same from plaintiffs, they will find for the plaintiffs, and assess the damages at such sum

as they may believe from the evidence the plaintiffs lost by reason of defendants' detention of the lumber."

The court refused the following asked by defendants: "1. If the jury believe from the evidence that the defendants were employed by the plaintiffs to raft and run the property sued for (consisting of lumber) from the Big Eau Claire, in the state of Wisconsin, to the city of St. Louis, in the state of Missouri, at the rate of five dollars and twenty cents per thousand feet, and that the defendants complied with their contract, the plaintiffs can not recover the said property sued for, unless the price for bringing the same has been complied with by payment, by virtue of a lien subsisting thereon for work and labor done and performed in the bringing of said lumber to the city of St. Louis, and state of Missouri, at the price aforesaid mentioned. 2. If the jury believe from the evidence that the plaintiffs and defendants are all nonresidents of the state of Missouri, they can not recover in this action. 3. From the evidence introduced by plaintiffs they have failed to make out a cause of action."

The jury found for plaintiffs.

*D. C. Woods*, for appellants.

I. The defendants had a lien on the lumber. (7 East, 224; 6 East, 518; Jones on Bailm. 90; Story on Bail. 421; 2 Denio, 628; 3 Gilm. 233; 11 Shepl. 214, 439; 5 Mete. 166; 9 N. H. 66; 19 Pick. 228; R. Stat. of Wisconsin, p. 893.)

*Krum & Harding*, for respondents.

I. The defendants had no lien upon the lumber by virtue of having worked as raftsmen in bringing it from Wisconsin to St. Louis; nor by virtue of the written contract. No breach of the contract was alleged by defendants. If there had been, the only consequence would have been to give Meek and Burns an action against plaintiffs for damages. The testimony excluded was immaterial and incompetent. The action of the court in giving and refusing instructions was proper.

NAPTON, Judge, delivered the opinion of the court.

This action was brought by the owners of a raft of lumber to recover the possession of it from the raftsmen, who had brought it down the Mississippi from some point in Wisconsin, and who withheld it under a claim of a lien for a portion of the compensation agreed on for rafting. There was a special contract between the plaintiffs and defendants. By this contract the compensation was specified for managing the raft over various rapids and landing it at St. Louis, or some point on the Mississippi above St. Louis to be designated by the plaintiffs; and it was also provided that the owners of the lumber (the plaintiffs) should "furnish money enough to pay off the men within twenty-four hours after the delivery of the said lumber to market." The balance of the agreed compensation was to be paid when the lumber was sold or estimated and measured.

Upon the trial, proof was offered by the defendants that the plaintiffs did not advance, and refused to advance, money enough to pay off the men when the raft reached St. Louis—the point which the plaintiffs designated for its delivery. This evidence was not allowed to go to the jury, and the court instructed that there was no lien.

The case, then, presents the two questions, first, whether there is a specific lien in such bailments, in the absence of any contract; and secondly, if there is, was the special contract proved a waiver of it.

The precise limits to which the doctrine of specific liens has been extended by modern decisions can not be regarded as altogether settled. There is some disagreement as to the true foundation of the privilege; some ascribing it solely to the obligation which the common law imposed upon persons engaged in particular pursuits, such as common carriers, inn-keepers, and certain classes of tradesmen and artificers, to undertake any service in their line of business upon the demand of any one, however little might be known of his individual responsibility. The lien, in such cases, was given

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to protect persons who were thus at the service of the public from imposition to which they would necessarily be subject in dealing with strangers. But a specific lien has been extended to many classes of artificers and bailees, who are not subjected to any such obligations as were supposed to attend these public employments we have alluded to. It is now conceded that a lien belongs to every bailee for hire, whose services have contributed to enhance the value of the property placed in his hands. The notion that certain pursuits partook so far of the character of public offices as to compel those engaged in them to accept every employment offered to them in the line of their business, if not entirely exploded, has at least long since become a mere abstract theory, and the principal basis of specific liens may be now regarded as resting upon the principle that the value of the property has been enhanced by the labor of the bailee.

It was held in England, and the decision appears to be still acquiesced in, that agisters are not entitled to a lien, upon the ground that no additional value was imparted to the animals by feeding them. Judge Gibson, of Pennsylvania, in *Steinman v. Wilkins*, 7 W. & S. 466, expressed doubts as to the propriety of these decisions, observing that "he was unable to see why a man, who fits an ox for the shambles by filling it with his provender, did not increase its intrinsic value." And *Beavan v. Waters*, Mood. & Walk. 235, where a trainer of a race-horse was allowed a lien, and *Scarfe v. Morgan*, 4 Mees. & Wel. 270, where a keeper of a stallion was allowed a lien on the mare for the price of the horse's service, were cited as instances in which the increased value of the bailment was allowed as a basis for the lien, and were not easily distinguished from the case of the agister.

The refusal to allow the agister a lien may be safely placed upon the same ground upon which it is denied to the keeper of a livery stable, that it is inconsistent with the very nature of the employment. Horses are taken to livery with an express understanding that they are to be given up to the owner whenever he has use for them. It is the same with

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agisters; the right of access at all times on the part of the owner, and his right to put the cattle or horses to such uses as he has for them, is implied from the nature of the bailment, and is totally inconsistent with a right of detention on the part of the bailee. In the case of the agister, as well as the livery stable-keeper, the lien is impliedly abandoned by the contract; and these exceptions can not be regarded as detracting from the applicability of the general principle to cases where the nature of the contract does not forbid the retention of the lien.

It was at one time supposed that in order to lay the foundation for a specific lien, the *intrinsic* value of the bailment must be increased by mechanical means. But this idea seems to be abandoned in the English cases, to which we have referred, and it is clearly disavowed in the Pennsylvania case of *Steinman v. Wilkins*, where a warehouseman was held to be entitled to his lien. Neither the warehouseman, the wharfinger, nor the common carrier, adds any thing to the intrinsic value of the article. But a great change in the actual market value of an article may be and is effected by a change of place, brought about by the carrier, and the lapse of time during which the property has been preserved by the warehouseman. The concession of the lien to the wharfinger and warehouseman is also conclusive that it is not given solely because of any unusual and extraordinary responsibility incurred, such as falls upon common carriers and inn-keepers. It is well settled that no such responsibility attends the employment of warehousemen and wharfingers, but the lien is allowed them as well as common carriers and inn-keepers.

We have not found any allusion to the business of raftsmen of logs or lumber contained in the elementary works or adjudged cases on this subject. We can only apply the principles we understand to be settled in reference to analogous employments. The raftsmen are not common carriers, but they are private carriers for hire. The fact that the materials transported require no vessel or craft to be interposed

between them and the element on which they are floated, can not, we suppose, distinguish the employment of raftsmen from that of other carriers by water, so far as the present question is concerned. That their skill and labor has added vastly to the value of the lumber, by transporting it from the forests of Minnesota to the market of a populous city, is obvious, although the lumber remains intrinsically the same in shape and size and quantity as it was at the mills from which it was started. Every consideration of justice and policy would seem to authorize the application of the general principle to such employments.

It is well settled that the existence of a special contract does not of itself discharge a lien. The contract must be examined, and if it expressly or impliedly waives the lien, there is, of course, an end to the question. Where, for instance, the payment of the price of the service is stipulated to be made at a date subsequent to the delivery of the property, upon which the labor has been expended, there can, of course, be no lien.

The contract in the present case undoubtedly repels all idea of a lien for so much of the contract price, or cost of transportation, as exceeded the sum necessary to pay off the hands at the place of delivery. But the plaintiffs agree to furnish money enough "to pay off the men (employed on the raft) within twenty-four hours after the delivery of the said lumber to market." If this expression is to be understood as meaning a delivery of the raft to its owners, there could then be no lien retained, as it is stipulated to precede the payment by twenty-four hours. But we do not understand the word "delivery" to be used in this strict sense, and to give it such a construction is to defeat the main purpose of the clause. The words "delivery to market" mean "arrival at the place of destination." When this point was reached by the raft, the owners were allowed twenty-four hours within which to furnish so much of the contract price of transportation as would enable the contractors to pay off the subordinate employees. The implication is very strong

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that, until this much at least was paid, there was no abandonment of the right of detention. The object of such a stipulation is manifest. A number of men must necessarily be turned loose without any certain employment, at a distance of hundreds of miles from home; and it was necessary that they should be furnished at least with the means sufficient to provide for their return. Why stipulate for the prompt payment of this sum and allow only twenty-four hours for its performance, if its non-performance is to be construed as a mere breach of contract, laying the foundation of a future suit for damages? Such a construction defeats all the purposes in view. It puts the agreement respecting the advance payment on the same footing with the agreement for the balance due, and thereby totally fails to secure the objects evidently in view. It leaves to the result of a long litigation to secure what was evidently designed to be prompt payment, to be coerced by a retention of the property, without awaiting the tedious process of a law suit.

We think the court should not have excluded the evidence offered, that the plaintiff refused to advance sufficient money to pay off hands, and that the plaintiffs had no right to recover possession of the raft until they had complied with their contract in this respect.

Judgment reversed and cause remanded.

SCOTT, Judge, dissenting. I am not prepared to say that a raftsmen has a lien for his services on the lumber rafted. The conduct of the parties show here that the lien was waived if any existed.

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THE STATE, Respondent, v. DOMINIQUE, Appellant.

1. A declaration made by a child two days before its death to a person who inquired of him the cause of the swollen appearance of his face, that "papa did it," held to be inadmissible in evidence against the father on his trial for the murder of the child, the declaration not being a part of the *res gestæ*, nor being made in *articulo mortis*.

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*Appeal from St. Charles Circuit Court.*

The facts sufficiently appear in the opinion of the court.  
*Krekel*, for appellant.

I. The court improperly admitted the declaration of the child. It was no part of the *res gestæ*. (1 Tenn. 280.)

*Edwards*, (circuit attorney,) for the State.

I. The declaration of the deceased was admissible as a part of the *res gestæ*. No consciousness of approaching death was necessary. (3 Cush. 181; 1 Swan, Tenn., 279; Whart. Am. C. L. 312.)

NAPTON, Judge, delivered the opinion of the court.

This judgment will be reversed on account of the admission of illegal evidence.

The indictment is one against a father for the unnatural crime of murdering his child, a boy about eight years old. There was evidence that the defendant displayed great fondness for the child, frequently bringing him presents of candy and toys, and making him say his prayers every night on retiring to bed; but there was also proof that he was in the habit of frequently whipping him, sometimes in a brutal manner and with a horsewhip. The defendant was addicted to intoxication.

In answer to a question propounded by the State to a witness, who spoke of observing the boy in the field two days before his death with a swollen face, as to the cause of this, the answer was, "I asked the child, and he said 'papa did it.'" The question and answer were objected to, but the evidence was admitted.

The declaration of the child as to the author of the injuries he had received is not evidence against the defendant. It was no part of the *res gestæ*. It did not occur at the time the injury was inflicted. Nor was it any explanation of the nature of the injury. It was a simple declaration that his father had occasioned it. If it had been made *in articulo*

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*mortis*, or when the solemnities of expected death would render superfluous the sanctions of an oath, it might have been admitted on that ground. \*But the declaration was made by the child two days before his death, when there did not appear to be any apprehension, either on the part of the child or the witness, who saw him, of any serious results from the injuries. It was, therefore, hearsay, and inadmissible.

The judgment is reversed and the cause remanded for a new trial. The other judges concur.



FARWELL *et al.*, Plaintiffs in Error, v. PRICE *et al.*, Defendants in Error.

1. A. at St. Louis shipped flour consigned to B. in Boston. C. at New Orleans, to whom said flour was shipped to be forwarded by him to B. in Boston, wrongfully converted the same. *Held*, in a suit brought by B. against C., that the measure of damages was the value of the flour at the place of destination.

*Error to St. Louis Court of Common Pleas.*

This was an action to recover damages for the wrongful conversion by defendants of two thousand and forty-seven barrels of flour belonging to plaintiffs. The cause was tried by the court without a jury, and the court, at the request of both parties, found a special verdict. The facts as found by the court in this special verdict were substantially as follows: About August 28, 1857, Merritt, Risley & Co., merchants of St. Louis, purchased a lot of flour containing two thousand and ninety-five barrels, and shipped the same to their factors, the plaintiffs, Farwell & Co., at Boston, via New Orleans, Louisiana, consigned to the care of defendants, Price, Converse & Smith. From the bills of lading taken by Merritt, Risley & Co. it appears that the flour was shipped to Price, Converse & Smith, at New Orleans, to be forwarded by them to the plaintiffs, the consignees, at Boston. At the

time of purchasing said flour, Merritt, Risley & Co. had authority to draw on the plaintiffs against or upon actual shipments, and drew on them, on account of the above shipment, four bills of exchange amounting to \$10,344, which were all accepted by the plaintiffs and have since been paid. There were no other bills drawn on account of this flour and accepted by any one. The flour went forward as far as New Orleans, arriving there early in September. Defendants received and forwarded forty-eight barrels thereof, but refused to receive and forward the residue, converting the whole to their own use. The manner of conversion was by causing the flour to be seized and attached at the suit of themselves as the property of Merritt, Risley & Co. The special verdict then proceeds to set forth the cost of the flour at St. Louis, its value at New Orleans at the time of the conversion, and its value in Boston if it had gone forward according to the bills of lading. Its value was less at New Orleans at the time of the conversion than it cost at St. Louis, or its value in Boston less the charges of transportation, fifty cents per barrel. At the time of the seizure of the flour by the defendants, they were creditors of Merritt, Risley & Co. in the sum of \$2,652.13. At the same time defendants were under acceptance for the accommodation of Merritt, Risley & Co. in the sum of about \$24,000, not then due. All of this indebtedness was on general account, and defendants had not advanced or accepted for Merritt, Risley & Co. on account of this flour or any part thereof. An agreement had been previously made between Merritt, Risley & Co. and defendants, by virtue of which Merritt, Risley & Co. gave to the defendants real estate security in the sum of \$25,000 to secure them against loss by reason of advances or acceptances for Merritt, Risley & Co.

The court declared the law "to be that the plaintiffs are entitled to recover of the said defendants damages according to the value of the flour by defendants converted as aforesaid at New Orleans at the time of said conversion, with interest thereon from the time of conversion; and that the

plaintiffs are not entitled to the Boston value of said flour, less the charges of conveying it thither, with interest as claimed by plaintiffs' counsel." The court refused to give, as requested by plaintiffs, the value of the flour at Boston as the same would have been at Boston had it gone forward without any interruption, less the charges of conveying it thither.

The court refused the following instructions asked by the defendants: "1. If the jury find from the evidence that Merritt, Risley & Co., of St. Louis, shipped the flour in question to the defendants, to be by them forwarded to the plaintiffs at Boston, to be sold by the plaintiffs on account of the shippers; that said property was attached in New Orleans by the defendants for a debt due them by Merritt, Risley & Co., then plaintiffs can not recover. 2. If the jury find from the evidence that Merritt, Risley & Co., of St. Louis, purchased the flour in question on their own account, and shipped the same to the defendants at New Orleans, to be forwarded to plaintiffs at Boston and there sold on account of shippers; that said defendants refused to receive the said shipment, but caused the same to be attached for a debt due them from Merritt, Risley & Co., then the plaintiffs can not recover. 3. If the jury find from the evidence that Merritt, Risley & Co. purchased the flour in question and shipped the same to the plaintiffs at Boston to be sold on account of the shippers, then the plaintiffs can not recover in this action. 4. If the jury find from the evidence that Merritt, Risley & Co. purchased the flour in question and shipped the same to the plaintiffs at Boston to be sold on account of the shippers, then the plaintiffs can not recover in this action, unless they further prove that they purchased said flour before the institution of this suit. The court refuses to give this instruction and declares that if the shippers (M., R. & Co.) were authorized to draw on plaintiffs against said shipments, and did so draw, and plaintiffs accepted and paid said drafts, that these facts gave them such title to the property as to authorize them to maintain this suit. 5. If the jury find from the

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evidence that Merritt, Risley & Co. purchased the flour in question, and shipped the same consigned to defendants at New Orleans, to be forwarded by said defendants to plaintiffs at Boston, to be sold on account of Merritt, Risley & Co., then the plaintiffs can not recover. 6. If the jury find from the evidence that Merritt, Risley & Co., of St. Louis, purchased the flour in question on their own account, and shipped the same consigned to defendants at New Orleans, to be forwarded by said defendants to the plaintiffs at Boston, to be sold on account of the said Merritt, Risley & Co.; that said Merritt, Risley & Co., when said flour arrived at New Orleans, were indebted to said defendants; that said flour never came to the possession of said defendants until after the same was attached; that said flour was afterwards sold by virtue of said attachment at the city of New Orleans, then the plaintiffs can not recover in this suit. 7. Upon the evidence in this case the plaintiffs are not entitled to recover."

The court gave judgment for the plaintiffs for \$9,540.13, in accordance with its ruling as above set forth. Both parties sued out writs of error.

*Gantt*, for Farwell & Co.

I. As to whether plaintiffs are entitled to any judgment, see *Holbrook v. Wright*, 24 Wend. 169; *Nesmith v. Dying, Bleaching and Calendering Co.* 1 Court. 130; *Gibson v. Stevens*, 8 How. 384; *Grove v. Brien*, 8 How. 429.

II. The court declared an erroneous measure of damages. The property was wrongfully converted at New Orleans. It was confided to defendants' care as commission merchants. The plaintiffs at Boston were entitled to receive it there. Of this right they were deprived by the wrongful act of defendants. The court should have given the value of the flour at Boston, less the cost of transportation. (*The Joshua Barker*, 1 Abbott's Adm'y R. 215; *Watkinson v. Laughton*, 8 Johns. 213; *Bracket v. McNair*, 14 Johns. 170; 14 Johns. 273; *Amory v. McGregor*, 15 Johns. 24; 2 Barn. & Ald. 932; *Gillingham v. Dempsey*, 12 S. & R. 188.)

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*Knox & Kellogg*, for Price, Converse & Co.

I. The mere drawing of bills of exchange by shippers of merchandise on a remote consignee does not pass the title to the merchandise so shipped to such consignee. Farwell & Co. had not instructed Merritt, Risley & Co. to purchase flour at St. Louis; nor were they under any agreement to accept drafts drawn on them. The most that the record shows is that F. & Co. had accepted bills drawn by M., R. & Co. before the shipment of the flour. It is asking too much of sister states that they should prevent their citizens from attaching the property shipped by nonresident debtors while in transit through the state in which the creditor resides. Our own courts would not hesitate to hold such property for the benefit of resident creditors. (26 Mo. 423.) If the defendants be liable at all, the measure of damages as determined by the court is correct. (Sedgw. on Dam. 480-1, 478-9, 531-4.)

NAPTON, Judge, delivered the opinion of the court.

Where property is in a state of transportation from one point to another, and a wrongful conversion of it occurs at some intermediate point, the question arises, in estimating the damages sustained by the owner, as to the point where the value of the property is to be taken, whether at the place of conversion, the place of delivery, or the place from which the goods were forwarded. Where the wrongdoer is the person employed as the agent of transportation, there seems to be very little doubt that the value of the goods at the place of the conversion is no criterion whatever for estimating the damages to which the owner is entitled. In such cases there has been some doubt expressed as to whether the place of embarkation or the point of destination should govern in the estimate of the owner's loss; but the rule, which establishes the point of delivery as the place where the value is to be taken, seems to meet with more general support. (*Gillingham and others v. Dempsey*, 12 Serg. & R. 183; *The Joshua*

Barker, 1 Abbott's Adm'y R. 218.) And where the wrongdoer is a mere stranger, a trespasser, it is not easy to see upon what ground he can insist that the value of the property at the place where the conversion occurs shall be the measure of damages to which the owner is entitled. Such a rule would, in effect, force the owner to dispose of his property in a market not of his own selection, and one where, per chance, the property might be valueless. A slave is sent by his owner in Missouri to Kentucky for the purpose of being there sold, and he is wrongfully taken from the possession of the owner's agent whilst in Illinois, on his way to Kentucky. Must the value of the slave in Illinois be the measure of damages to which the owner is entitled in his action against the wrongdoer? Or rather, is it not clear that the value of the slave either in Missouri or in Kentucky must govern? In such cases of mere trespasses, probably the value at the place of embarkation, or point from which the property is started, ought to govern. However this may be, the price of the property at the place where the conversion occurs will not do; for in the case put, slaves would be of no value in Illinois, unless their transportation to another market was in view; and if this is taken into consideration, notwithstanding there may be no capital seeking such investments, the rule, which fixes the value at the place of destination as the standard of damages, would be approximated, though not absolutely reached. Going no further for illustration than the case under consideration, we see, as a matter of fact, that the market value of the flour at New Orleans is not at all times the same as at Boston minus the cost of transporting it from one point to the other, though doubtless any considerable disparity could not long continue. Scarcity of capital or other circumstances may depress the price of an article in one market below its value in another, after deducting the expense of removing the article, though, in the present condition of trade, this state of things is not likely to continue long. But as the price of an article must mainly be regulated by its value for home consumption, and

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must be so altogether if there is no capital engaged in its removal to other places, the price at the place of conversion would, in most instances, prove an inadequate compensation for the loss sustained by the owner.

In actions against carriers for the wrongful conversion of property entrusted to them, damages have been usually given according to the value of the goods at the place of destination. We do not see how the forwarding merchant occupies any better position, in respect to this liability, than the carrier. He is the agent of the consignor; and if he fails to discharge his duty to his principal, and converts the goods to his own use, the principal, or the party standing in his place, ought to be recompensed to the extent of his injury, having reference to proximate and natural results.

In *Bell and others v. Cunningham and others*, 3 Pet. 69, a firm in Leghorn were consignees of a cargo shipped from Havana by their correspondents in Boston, who owned a ship trading from Havana to Leghorn, under instructions to invest part of the proceeds in tiles and the remainder in paper, the whole to be shipped to Havana. The whole sum was invested in paper, taken to Havana, and sold and produced a loss instead of a profit, which would have resulted had the tiles been bought as directed. The profits, which the investment in tiles would have made at Havana, were held to be the measure of damages, although it was insisted that the defendants were only liable to account for the money which ought to have been invested in tiles at Leghorn, and not the value of the tiles at Havana. The breach of the contract, the court said, consisted not in nonpayment of the money, but in the failure to invest it in tiles. "Speculative damages," Judge Marshall added, "dependent on possible successive schemes, ought never to be given; but positive and direct loss resulting plainly and immediately from the breach of orders may be taken into the estimate. An estimate of possible profit to be derived from investments at Havana, of the money arising from the sale of the tiles, taking into view a

distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves *at Havana* affords a reasonable standard for the estimate of damages."

Where an agent is directed to invest the funds of his principal in a particular stock, and he neglects to do so, and the stock thereupon rises, the principal is entitled to recover the enhanced value, as if the stock had been purchased. (Mayne on Damages, p. 312.) So, if an agent improperly withholds the money of his principal, he is liable for the ordinary interest of the country *where it ought to be paid*, and the incidental expenses of remitting it, if it ought to be remitted. (Story on Agency, § 220, 221; Short v. Skipwith, 1 Brock. 103.)

The defendants, in this case, did not occupy the position of mere trespassers liable for a tort, but were entrusted by the shippers with the duty of forwarding the flour to Boston. The flour was delivered to the carriers as the property of the plaintiffs, who were the consignees of the shippers, and who had accepted and paid bills drawn upon the shipment. The delivery to the carrier vested the title in the plaintiffs under the circumstances, and their right was therefore prior, in point of time, to any lien which defendants might have acquired by reason of the prior indebtedness of the consignors to them. It is plain, however, that no such lien existed. They were only agents to receive the goods on commission to forward them to plaintiffs, and were advised by the bills of lading that the flour was shipped for and on account of Farwell & Co., the plaintiffs. Their attachment of the property, therefore, was not a simple trespass, but a breach of their duty as forwarding merchants, and the rule of damages applicable to similar agencies must be enforced.

Judgment reversed and cause remanded. The other judges concur.

O'CONNER, Defendant in Error, v. DUFF *et al.*, Plaintiffs in Error.

1. Where a surprise of a party on the trial of a cause results from a want of diligence on his part—as where he is surprised by the testimony of his own witness, from whom he had sought no information previous to the trial—the court will not be warranted in granting a new trial on the ground of surprise; the court should also be satisfied that the injury sustained could probably be repaired on a second trial.

*Error to Hannibal Court of Common Pleas.*

The facts sufficiently appear in the opinion of the court.  
*Gantt*, for plaintiffs in error.

I. The court should have granted the motion for a new trial. (*Wilson v. Branson*, 8 Geo. 136; 3 Gra. & Wat. on N. T. 953; 9 Dana, 134; *Levy v. Brown*, 6 Engl. 16.)

*Harrison, Dryden & Lipscomb*, for defendant in error.

I. The court properly overruled the motion for a new trial. There was no surprise that would justify the granting of a new trial. The proceedings of the defendant from the beginning were marked by negligence. (See 12 Mo. 380; Gra. & Wat. N. T. 194.)

EWING, Judge, delivered the opinion of the court.

The question in this case arises on the motion for a new trial, founded on the alleged surprise of the defendants by the testimony of one of their witnesses, whose affidavit is filed in support of the motion.

The action is on an agreement, under which the plaintiff claims to have sold and delivered to Duff & Co. a number of scoop-carts for use on the Hannibal and St. Joseph Railroad, at a stipulated price. The plaintiff was the inventor and patentee of this article, residing at Cincinnati, and he alleges a contract with defendants for the purchase of twenty scoop-

carts then in Peoria, Illinois, at eighty dollars each, and for plaintiff's charges as the patentee on thirty other scoop-carts, then in Cincinnati, at twenty-two dollars and fifty cents each; that these last were accordingly delivered at Cincinnati, and the other shipped from Peoria to Hannibal by request of Talcott, one of the defendants. The answer denied all the allegations of the petition.

Smith, a witness for the plaintiff, proved substantially the allegations of the petition, and detailed a conversation that occurred between the plaintiff and Talcott, one of the defendants, in which the plaintiff related to him the particulars of the agreement entered into with one Otis, representing himself as defendants' agent, and that Talcott assented to and approved of all that had been done by Otis, and said he knew that such a contract had been made by Otis for Duff & Co.; but added that they (the defendants) did not wish to have the carts at Peoria, but that if plaintiff would send the twenty carts that were there to Poage & Miller, at Hannibal, Duff & Co. would pay for them the eighty dollars each, on their arrival Hannibal, and the charges of transportation. It was also proved by this witness that the carts ordered from Cincinnati, upon their arrival at Hannibal, were by defendants sent, a part to Smith & Otis, on the railroad, which were subsequently disposed of, and the remainder, fifteen in number, sent to the western end of the road. Levering, a witness for defendant, corroborated this statement, and testified that the carts sent to Smith & Otis were charged to their account as sub-contractors under Duff & Co., and the remainder were sent to John Corby at St. Joseph, also a sub-contractor. This witness, who was Poage & Miller's clerk, states also that defendants' clerk, Southack, informed him that they (defendants) had ordered a lot of scoop-carts from Peoria to Miller & Poage, for themselves, and requested witness to take charge of them when they arrived, and notify Duff & Co.; that they were shortly thereafter received, having been sent by plaintiff, and upon so informing Southack

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he replied it was all right, and witness was desired to take charge of them, which he did, and they were subsequently sold by Miller & Poage to pay charges.

Otis, (introduced by defendants,) by whose testimony they allege they were surprised, gives a detailed and circumstantial account of what took place between him and Duff, one of the defendants, in the course of which, after detailing what he stated to Duff as to the price, terms, &c., on which the carts could be purchased, testifies that thereupon Duff authorized him to contract with the plaintiff for one hundred carts on the terms stated by witness; that he was about leaving for Boston on business for defendants, and Duff directed him to make the purchase on his way; that before making it he concluded to buy but fifty instead of one hundred, thinking that number sufficient; and he entered into a contract with plaintiff, as instructed by Duff, for fifty carts, on terms which he states, and which are as averred in the petition; that the patentee's charges defendants were to pay plaintiff as soon as they disposed of the carts; and further agreed to take for defendants twenty carts at Peoria at eighty dollars each; that he made this contract with plaintiff at the instance of John Duff for John Duff & Co., and not on account of Smith & Otis. He corroborates other witnesses as to the disposition of the carts received from Cincinnati; that those sent to Monroe city were not used on the road; that he regarded the contract about the carts at Peoria as conditional, and that he expected plaintiff would see him again about them.

Southack, defendants' clerk, said that they paid the manufacturers at Cincinnati the amount for making thirty carts; that they were received by Duff & Co., and disposed of as already stated. Otis, in his affidavit filed in support of the motion for a new trial, states substantially that he and Smith had a contract with plaintiff, by which they were to make sale of his patent carts or use them on the railroad upon certain terms then stated; that they (O. & S.) were unable to

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pay the manufacturers their price, and that Duff wished them to bring on a lot of the carts, and he would advance money for them to the manufacturers to enable them to obtain them, and Duff & Co. were to hold a lien on the carts until they were sold and the money refunded to them; that there was no agreement with Duff & Co. that they were to pay to plaintiff any thing on said carts; no agreement that Duff & Co. were to pay to O'Conner any sum as his patentee charges; that when the carts were sold, Smith & Otis were to pay O'Conner; that he sought to give this testimony on the trial, and if he was differently understood his evidence was misapprehended. The motion of defendants, which is sworn to, denies any such contract or any contract whatever as testified to by Smith & Otis; that their testimony is wholly untrue, and takes them by surprise; that they have a just defence to the action, and will make it appear, if a new trial be granted, by the next term of the court.

It will be seen from the foregoing statement that the two witnesses who testify more in detail as to the terms and stipulations of the contract agree in all substantial particulars, and that the other witnesses, as far as they go, corroborate them. Smith first details minutely a conversation between Talcott and the plaintiff, in which all the particulars of the agreement, as previously entered into between Otis (representing himself as defendants' agent) and O'Conner, are recited, which Talcott at once recognized, and unhesitatingly assented to; only suggesting a modification as to the place of delivery of the Peoria carts, to which Otis agreed. Next is Southack, who strongly supports Smith's testimony, proving a recognition by defendants of the agreement in ordering the carts from Peoria, and directing the disposition to be made of them on their arrival, and subsequently approving of what had been done in the premises. In further confirmation is Levering's statement, from which it would appear that the defendants treated the carts as their own property and not as the property of Otis & Smith. Lastly, Otis

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himself, who, while agreeing with Smith in all essential particulars, states clearly that Duff authorized him as his agent to contract with O'Conner according to specified instructions; that he made it at the instance of John Duff for John Duff & Co., and not on account of Smith & Otis. The entire statement of the transaction by this witness is clear and intelligible, and certainly leaves nothing to mere inference or conjecture. But, as if to remove all possible ground of doubt or misapprehension as to his meaning in reference to the decisive fact in the case, he repeats it (although it must have been sufficiently obvious from what he had already said) in the form and with the emphasis of a negative as well as an affirmative statement. His affidavit filed in aid of the motion unqualifiedly contradicts this statement, and it is hardly conceivable that he was misunderstood by the jury.

A conclusive reason, however, in support of the action of the court below in overruling the motion, is the manifest want of diligence that appears. The defendants say in their motion that until the testimony of Smith & Otis was given, they had no knowledge or information of it; but it does not appear that they sought any information from their own witness before he was sworn, or made any effort to ascertain what his testimony would be, and the evidence of this witness, it is maintained, must have mainly influenced the verdict. If the surprise results from the least want of diligence, the applicant will be without excuse; he must be wholly free from blame. (Gra. & Wat. N. T. 963.) And the court must be satisfied that the injury sustained may be repaired on a second trial.

The cases cited by the defendants' counsel do not sustain them, but, on the contrary, furnish such illustrations of the rule respecting diligence as sustain the action of the court below. In 9 Dana, 134, the witness, by whose testimony the party was surprised, had previously to the trial stated to the party calling him facts important to that side of the case materially different from those testified to under oath. The case in 8 Geo. 136, is similar, and the new trial was granted

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on the same ground—the testimony of the witness on the trial contradicting his statement made to the party previously. In the other case cited (6 Eng. 16) one of the plaintiffs, who was made a witness by the defendant, testified before the justice to facts decisive of the case in favor of the defendant, and, on appeal, to a different state of facts. The court held that under the circumstances there was no want of diligence in not procuring other witnesses on the trial in the appellate court, and that there was good cause for a new trial on the ground of surprise.

It is generally in the power of a party to ascertain the facts he expects to prove by his own witnesses, and where this is omitted, when it may be done, *laches* is imputable to the party, and there is no legal surprise in such cases. See *Nelson v. Waters*, 18 Ark. 574, and 6 Cal. 228, where the rule is laid down without any qualification.

The application is also defective in another particular. It states "that they have a just and legal defence to the action, and that if a new trial be granted, they will be ready to prove their defence by the next term of the court." The names of the witnesses, by whom they expected to make this proof, do not appear, nor do they state any facts to satisfy the court that their defence could probably be established, or that they would be at all benefitted by a new trial.

Judgment affirmed; the other judges concurring.

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VAUGHN, Respondent, v. SCADE *et al.*, Appellants.

1. In all trials in courts of record in which a party is entitled to a jury, the jury must consist of twelve men. The right to demand in such cases a jury of twelve men is a constitutional right.
2. The provision in the act organizing the St. Louis law commissioner's court prescribing that "in all jury trials in said court the jury shall consist of six lawful jurors, or a less number if the parties shall consent thereto," is unconstitutional; juries in that court, as in all courts of record, must consist of twelve men. (R. C. 1855, p. 1597, § 6.)

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3. If, however, a trial in said court proceeds with a less number than twelve jurymen, and no exceptions are taken on that ground, a party can not avail himself of the error except by motion in arrest of judgment, which must be made within the time prescribed by law or the rules of court.
4. There is nothing in the bill of rights which prevents parties from trying, by consent, their causes in the St. Louis law commissioner's court with six jurors, as provided in the act organizing that court; the consent should always, in such cases, be entered of record.
5. Courts should not confuse juries by instructing at too great length.
6. He who drives a carriage in a crowded street should exercise a diligence proportionate to the dangerous nature of the employment.
7. To authorize one defendant to testify in behalf of his co-defendant, his testimony must be such as will not weigh in his own behalf; it should bear upon some special defence peculiar to such co-defendant.

*Appeal from St. Louis Law Commissioner's Court.*

This was an action to recover damages for an injury to an infant son of the plaintiff, an injury alleged to have been caused by the negligent driving of a carriage by a servant of defendant. At the trial, when the cause was called for trial, the plaintiff demanded a jury, and the defendants demanded that the action should be tried by a jury of twelve men, insisting upon that number under the constitution. The court refused to empanel a jury of more than six persons. Exceptions were duly taken. Much testimony was adduced to show the circumstances under which the alleged injury took place, and the degree of negligence or care exercised by the driver. The defendant Scade called his co-defendant Sauer and asked the court to allow him to be sworn and examined "as a witness on behalf of said Scade, to prove matters material for the defendant Scade." The court refused this on objection of plaintiff. The same request was made in behalf of defendant Sauer, and overruled. It is deemed unnecessary to set forth the instructions.

*C. D. Coleman*, for appellants.

- I. The court improperly refused to empanel a jury of twelve men. The court was a court of record. The right to a jury of twelve men was a constitutional right. (2

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Kern. 198; 2 Wis. 22; 2 Park. 312; 3 Wis. 219; 2 Ohio, N. S., 296; 3 Park. 22, 544; 4 Ohio, N. S., 167, 494; 18 Barb. 451; 5 S. & M. 664.) The court erred in giving and refusing instructions. The court erred in not permitting the defendants to be sworn in each other's behalf.

*Decker & Voorhis*, for respondent.

I. The court properly refused the demand for a jury of twelve men. The provision in the act organizing the court authorizing a jury of six men is constitutional. It was not intended by the constitutional provision to tie up the hands of the legislature so that no regulations of the trial by jury could be made. (Sedgw. on Stat. and Const. Law, 547.) It has reference rather to the *principle* of trial by jury than to the number of jurors. The provision of the constitution is not violated so long as the trial by jury is not substantially impaired, although it be made subject to new modes and even rendered more expensive. (Ib.; *Beers v. Beers*, 4 Conn. 539; *Colt v. Eves*, 12 Conn. 243.) We are not bound by the common law definition of a jury. (1 A. K. Marsh. 213; 2 Strob. 560; 14 Ill. 171.) In 1816, the common law was introduced. Both before and after this introduction, the subject of trial by jury underwent various changes as to the right, mode and number of jurors. (1 Terr. Laws, 5, 61, 89, 172, 307, 851.) Under the state organization, the legislature has always exercised the power of modifying trial by jury in mode and number. (See R. C. 1825, p. 47, 485; 1835, p. 360, 367, 463, 546-8; 1845, p. 653, 662, 426, 429, 499; 1855, p. 954, 965, 1261, 1262, 1372.) Before and since the adoption of the constitution, the courts have dealt with the institution of trial by jury without regard or reference to the common law definition. The court did not err in instructing the jury. (19 Mo. 507, 566; 4 Dana, 497; 17 Barb. 94; 9 Porter, 336; 3 M. & W. 244; 10 M. & W. 545; 11 East, 60; 12 Q. B. 439; 8 Man. Gr. Scott, 115, 123.) The court properly refused to allow the defendants to testify for each other.

Scott, Judge, delivered the opinion of the court.

This was an action for negligently driving a carriage, whereby a child of the plaintiff was injured, by which the child's services were lost and expenses incurred in curing him. There was a judgment for the plaintiff.

The case originated in the law commissioner's court, and was tried there. On the cause being called for trial, the plaintiff demanded a jury, and thereupon the defendants required that the action be tried by a jury of twelve men, objecting to a less number; but the court refused to have empanelled a jury of more than six, to which the defendants excepted.

The law commissioner's court is a court of record, exercising its jurisdiction according to the course of the common law. The act organizing that court prescribes that in all jury trials in said court the jury shall consist of six lawful jurors, or a less number, if the parties shall consent thereto. (Sec. 6.) The eighth article of the declaration of rights annexed to the constitution of this state declares that the right of trial by jury shall remain inviolate. This is not the first occasion on which the attention of this court has been called to this provision in the declaration of rights. In the case of the *Bank of Missouri v. Anderson*, 1 Mo. 175, decided as early as 1822, it was the opinion that the provision in the bill of rights under consideration required that the jury should consist of twelve men, and, among other things, that they should be unanimous in their verdict. Certainly if there are any essential requisites in a jury trial, among them must be the number of jurors and unanimity in their verdict. If the declaration of rights does not preserve these elements of the trial by jury from change, then it is in the power of the general assembly to take away from that mode of trial all those incidents which have endeared it to the people among whom it has prevailed. If, in cases where the right to a trial by jury is secured, the number of jurors can be reduced from twelve to six, with equal propriety it

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can be reduced to two or four. The term "trial by jury" was well known and understood at the common law, and in that sense it was adopted in our bill of rights. Of course the non-essentials of that institution, such as concern the qualification of jurors, the mode of summoning them, and many other such matters, were left to the regulation of law. The constitution is preserved in retaining the substance of that form of trial as it was known and practiced among those from whom we have derived it. This subject has undergone examination in other tribunals, and we find them concurring in those views. They unite in declaring that where there is a constitutional guaranty of the right to a trial by jury, twelve is the number of which the jury must be composed. (*Work v. The State of Ohio*, —, 296; *Byrd v. The State*, 1 How., Miss., 177; *The State v. Cox*, 3 Ark. 436; *Dowling v. The State*, 5 Sme. & Mar. 664.)

We are of the opinion that, as the court of the law commissioner is a court of record, having common law jurisdiction and proceeding according to the course of the common law, that in trials in that court a party is entitled to a jury of twelve men when he demands it; but if the trial proceeds with a less number, and he takes no exception on that ground, he can not afterwards avail himself of the error except by motion in arrest of judgment, which of course would be made within the time prescribed by law or the rules of court. In the absence of one party, the opposite party should see that his proceedings are regular. There is nothing in the bill of rights which would prevent the parties, by consent, from trying their causes in the law commissioner's court as heretofore with six jurors, but in such cases the consent, should always be entered on the record.

In coming to the conclusion that a jury in the court of the law commissioner must consist of twelve men, we do not wish it to be understood that it follows as a matter of course that a jury in a justice's court must likewise consist of twelve men. We are of the opinion that justices' courts, not being courts of record, are not within the constitutional

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provision, and that it would be competent for the legislature to make all the causes in such courts triable by the justice alone. Juries did not form a part of the machinery of such tribunals at the common law. It is not disputed that the article in the bill of rights securing the right to a trial by jury did not extend to proceedings in courts of chancery. The legislature in its discretion may give assistance to justices in the exercise of their jurisdiction, and that may be any number of men that is deemed expedient. Moreover, from the judgments in justices' courts there is an appeal to the courts of common law where the parties are entitled to a trial by jury unless it is waived. (*Emerick v. Harris*, 1 Binn. 416; *Work v. The State of Ohio*, —, 296; *Norton v. McLeary*, 8 Ohio, N. S., 205.)

We see no errors in the giving or refusing instructions such as would warrant a reversal of the judgment. The only thing that surprises us is their number. We can not conceive how parties expect to aid juries in coming to a correct verdict by such a multitude of instructions. Instead of enlightening the jury, they serve only to confound them. It would be a great deal better if the courts would take this matter in hand and instruct the jury in such a way as would aid them in forming their verdict. From the instructions offered on both sides, the court might frame one or two which would be sufficient in most cases.

He who undertakes to drive a carriage in a crowded street must exercise a diligence proportionate to the dangerous nature of that employment. He must know that there are women and children in the street, and that their necessities compel them to be there. If one is found off the crossing, he is not therefore liable to be run over. When, by a diligence proportionate to the nature of the service in which one is employed, he can avoid injuring one who is found off the crossing, it is his bounden duty to use reasonably that diligence in order to do so. A driver who sees a child lacking discretion in the street, should exert more care to avoid doing an injury than he would use for the safety of a person whose

presumed age and experience would prompt him to take steps necessary for his own security.

There was no foundation laid for examining the defendants for each other. It was not shown that the matter offered to be proved was such that, whilst it would authorize a verdict in favor of the defendant examining his co-defendant, it would not also be favorable to the defendant who was sworn.

We do not see what the state of the health of the plaintiff's wife had to do with the case, nor the arrest of the driver.

Judgment reversed and cause remanded ; Judge Ewing concurring. Judge Napton absent.

[CONTINUED TO VOL. XXXI.]

# INDEX.

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## A

### ABATEMENT.

See PRACTICE, 24.

### ACCOUNT.

1. Where a creditor in stating an account between himself and his debtor gives a credit therein to the latter by mistake, or is induced to give such credit on terms and conditions that are not afterwards complied with by the debtor, he ought to be permitted to avail himself of these facts in a suit against the debtor to recover the item for which the credit was allowed. *Moore v. Albright*, 249.

### ACKNOWLEDGMENTS.

See CONVEYANCE. JUSTICES' COURTS.

### ADMINISTRATION.

See GUARDIAN.

1. A testator can not, by devising his lands away, deprive his executor of the power of sale for the payment of debts. *Shaw v. Nicholas*, 99.

### ADVERSE POSSESSION.

See LIMITATION.

### AGENCY.

See PRINCIPAL AND AGENT.

### AGREEMENT.

See BONDS. BILLS OF EXCHANGE AND PROMISSORY NOTES. STATUTE OF FRAUDS. LIEN, 2. SLAVERY.

1. The creditors of one A. agreed to give to him and his endorsers an extension of time on their obligations. B., one of the creditors of A. signed this agreement in the following form: "B.—provided I have the same endorsers for \$3,500." B. surrendered to the trustees appointed by the creditors notes to the amount of \$3,500, which were cancelled and a new note given. *Held*, in a suit instituted on a note not included among those amounting to \$3,500 surrendered to the trustees, that the agreement to give time did not apply to the note sued on. *Garnier v. Papin*, 243.
2. An agreement to give an extension of time on a promissory note constitutes no bar to an action thereon. *Id.*
- 3 A., B., C. and D., by written agreement, bound themselves "each to the others," that they would purchase a steamboat, contributing in

AGREEMENT—(*Continued.*)

equal shares to the payment of the purchase money, A. to act as master of the boat when purchased, and B. as clerk. The agreement contained this further provision: "And it is further agreed between the parties, that should any of them at any time after said purchase desire to sell his interest in said boat, the other parties to this agreement, or such of them as may have an interest in said boat at the time, or such person as a majority of them may select, may have the preference in purchasing said interest, provided he or they so proposing to purchase will do so on the same terms that the party so wishing to sell may be able to obtain from the other parties." *Held*, that this agreement was several only; that each party bound himself to the others, and that two of said parties could not be sued jointly by a third for breach of the above stipulation. *Perry v. Kerr*, 349.

4. An agreement to dispose of property by will in a particular way, if made on a sufficient consideration, is valid and binding. *Wright v. Tinsley*, 389.
5. Although circumstances may render it impossible to specifically enforce such an agreement exactly, yet its substantial specific enforcement will be decreed. *Id.*

## ALLUVION.

1. The principle upon which the right to alluvion is placed by the civil law—which is essentially the same in this respect as the Spanish and French law, and also the English common law—is, that he who bears the burdens of an acquisition is entitled to its incidental advantages; consequently, that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be annexed to it. This rule is inapplicable to what are termed limited fields, *agri limitati*; that is, such as have a definite fixed boundary other than the river, such as the streets of a town or city. *Smith v. St. Louis Public Schools*, 290.
2. A lot in a town or village may be entitled to riparian privileges if bounded on a river; yet if, as originally granted, it were bounded or limited on all sides by streets, the owner thereof would not become a riparian proprietor and entitled to alluvion by reason of the fact that the original concession or grant, besides the street, also called for the river in front. *Id.*
3. In the year 1766, the French commandant at the post of St. Louis granted and conceded to Pierre François DeVolsey a lot of ground in said village, of two hundred and forty feet front on the side of the Mississippi and fronting thereto (du côté du Mississipi et y faisant face), by three hundred feet in depth on the side of the woods (du côté du bois), having said front upon the grand (or main) street (tenant la dite face et par devant la grande rue,) in the rear another main street (une autre grande rue), &c. The concession was bounded on the sides also by streets. *Held*, that the concession did not constitute the grantee a riparian proprietor; that the concession was bounded by the street in front and not by the river; that neither he nor his grantees would be entitled to alluvion formed in front of the street. *Id.*

## AMENDMENTS.

See PRACTICE.

## ASSAULT AND BATTERY.

See PRACTICE, 24.

## ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See FRAUD AND FRAUDULENT CONVEYANCES.

1. Where deed a of assignment of goods is, on its face, in trust to the use of the grantor therein, it is fraudulent and void as against creditors, existing and subsequent, and purchasers; and the courts will so declare as a matter of law. *Johnson v. McAllister, Assignee*, 327.
2. Where, however, the deed is not void on its face, and extrinsic evidence is adduced to show it to be fraudulent, the court will submit the issue of fraud, under proper instructions, to the jury, who will determine, as a matter of fact, whether the deed is fraudulent or not. *Id.*
3. The fact that a deed of assignment gives the assignee the privilege of selling the assigned goods on a credit does not render the deed void on its face. *Id.*
4. The thirty-ninth section of the act concerning voluntary assignments (R. C. 1855, p. 210) does not prevent a debtor from assigning his property for the benefit of a portion only of his creditors; said section operates to invalidate all provisions in such assignments which give preferences among the designated creditors; the designated creditors are entitled to be paid *pro rata* out of the proceeds of the assigned property. *Id.*
5. The reservation to the grantor in a deed of assignment for the benefit of certain designated creditors of any surplus there may be after the payment of the debts of such preferred creditors does not render the deed void on its face. *Id.*
6. A general assignment made by a debtor for the benefit of his creditors is not entirely invalidated by the fact that some of the claims are fictitious and fraudulent, and known to be such by the assignee; the participation of the assignee in the fraud contemplated by the debtor furnishes no obstacle to the enforcement of the rights of the *bona fide* creditors. If the assignee is disposed to promote the fraudulent purposes of the grantor, he may be displaced and another appointed. The fraudulent claims can be contested as well in the administration of the effects by the assignee, under the orders of the court, as in a suit by an attaching creditor. *Pinneo v. Hart*, 561.
7. Such a deed of assignment would not, under such circumstances, be void, although all the honest creditors should repudiate it. *Id.*

## ATTACHMENT.

1. Where in an attachment suit the defendant files a plea in the nature of a plea in abatement putting in issue the truth of the facts alleged in the plaintiff's affidavit, and the issue raised by this plea is found for the plaintiff, the defendant should be allowed time, if he ask it, without terms, to file an answer in bar of the action. *Bourgoin v. Wheaton*, 215.
2. The objections to a writ of attachment issued in aid of a suit, that the

ATTACHMENT—(*Continued.*)

caption of the writ and affidavit does not correspond with the title of the suit; that the cause of action set forth in the petition is improperly described in the affidavit and writ, are waived by the filing of a plea in the nature of a plea in abatement. *Henderson v. Drace*, 358.

3. No attachment should be dissolved on account of the insufficiency of the affidavit, if the plaintiff shall file a good and sufficient affidavit in such time and manner as the court may direct. (R. C. 1855, p. 254, § 58.) *Id.*
4. If the bond filed by the plaintiff in an attachment suit be insufficient, he has a right to file another. (R. C. 1855, p. 242, § 9.) *Id.*
5. An attachment issued on the 13th of August, the affidavit and bond, which were not dated, were certified by the clerk to have been acknowledged on the 18th of August. *Held*, that, although this was probably a clerical error, yet if the affidavit and bond were not formally filed until five days after the writ of attachment issued, this would not authorize the quashing of the writ. *Id.*

## AVERAGE.

See GENERAL AVERAGE.

## B

## BAILMENT.

See LIEN.

## BANKERS.

1. By the forty-fourth section of the first article of the act concerning banks and banking institutions, approved March 2, 1857, all checks drawn on bankers and made payable in currency, were made payable in silver and gold or the notes of specie-paying banks. *Morrison v. Mc Cartney*, 183.

## BANKS.

1. The City of Lexington was authorized by its charter "to levy and collect taxes upon real and personal property within the city, not exceeding," &c. (Sess. Acts, 1845, p. 161.) The Farmers' Bank of Missouri was incorporated by an act of the general assembly approved March 2, 1857, and established in the city of Lexington. (Sess. Acts, 1857, p. 34.) By the thirty-second section of said act it was provided as follows: "In consideration of the privileges granted by this act to the banks incorporated in this state, each banking company agrees to pay to the state annually one per cent. on the amount of the capital stock paid in by the stockholders other than the state, which shall be in full of all bonus and taxes to be paid to the state by the respective banks." By ordinance shares of stock in incorporated companies (excepting manufacturing companies) were subjected to taxation for city purposes. It was further provided that persons owning shares of stock that were taxable were not required to deliver to the assessor a list thereof, but the president, or other chief officer, of such corporation was required to deliver to the assessor a list of all shares of stock held therein, and

## BANKS—(Continued.)

the names of the persons holding the same. For a violation of this provision on the part of such officer by a failure to hand in such a list, the ordinance attached a penalty of one thousand dollars. *Held*, that the Farmers' Bank of Missouri was subject and liable to the tax thus imposed; that the penalty imposed upon the president for a refusal to hand in the required list to the assessor was legal and valid. *City of Lexington v. Aull*, 480.

2. By the thirty-second section of the first article of the act of the general assembly concerning banks and banking, approved March 2, 1857, (Sess. Acts, 1857, p. 22,) the banks were exempted from taxation for state purposes alone. The shares of stock in said banks, and the money and notes of other banks in their possession, are subject to taxation for local municipal purposes. *Town of Paris v. Farmers' Bank of Missouri*, 575.
3. The town of Paris is authorized by its charter to tax for municipal purposes the money and bank notes of the other banks in possession of the branch at Paris of the Farmers' Bank of Missouri. *Id.*

## BILL OF PEACE.

See EQUITY, 11.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. One B. F. C. C., member of a partnership firm doing business under the style of "C. & Co.," executed a promissory note in his own name, B. F. C. C., and procured the signatures of persons not members of said firm as endorsers for his accommodation; before procuring the sale of the note, and without the knowledge of said endorsers, he added to the signature the words "& Co."—thus making it "B. F. C. C. & Co." The same was then sold for his accommodation. *Held*, in a suit by the purchaser against the maker and endorsers, that the endorsers were discharged by the alteration. *Haskell v. Champion*, 136.
2. No written assignment of a promissory note is necessary in order to entitle the holder to sue thereon in his own name. *Willard v. Moies*, 142.
3. The assignee of a non-negotiable note can maintain no action against the assignor unless he has first used due diligence to recovery of the maker, or unless such maker is a nonresident or insolvent. (R. C. 1855, p. 323.) *Ivory v. Carlin*, 142.
4. A drawer of a check is not discharged by any laches of the holder in not making due presentment thereof, unless he has suffered loss or injury by the delay. *Morrison v. McCartney*, 183.
5. A., on the 2d of October, 1857, drew a check on B., a banker, in favor of C., who, on the same day, transferred the same for value to D. On the 3d of October, about two o'clock in the afternoon, the banking-house of B. suspended payment. On the 6th of October, 1857, A., who had previously instituted suits by attachment against B. to recover the amount of his deposits, compromised the same and received his deposits. The check was not presented until January 29, 1858, when payment was refused. The check was then duly protested and notice

## BILLS OF EXCHANGE AND PROMISSORY NOTES—(Continued.)

- given. *Held*, in a suit by D., the holder, against A., the drawer, that the latter was not discharged by the delay. *Id.*
6. By the forty-fourth section of the first article of the act concerning banks and banking institutions, approved March 2, 1857, all checks drawn on bankers and made payable in currency were made payable in silver and gold or the notes of specie-paying banks. *Id.*
  7. In the case of the non-payment of a negotiable promissory note, which has been negotiated, the four per cent. damages, allowed by the seventh section of the act concerning bills of exchange and negotiable promissory notes, (R. C. 1855, p. 294,) can not be recovered, if payment of the principal sum, with the interest and charges of protest be made within twenty days after demand or notice of dishonor. *Farrell v. Fritschle*, 190.
  8. If suit be brought on such a note within twenty days from the maturity of the note, the plaintiff will not be entitled to the four per cent. damages. *Id.*
  9. A party who writes his name on the back of a promissory note of which he is neither payee nor endorsee, is, *prima facie*, a maker of the note, and the payee is entitled to recover against him without proof of demand on the maker and notice of nonpayment. *Baker v. Block*, 225.
  10. An agreement to give an extension of time on a promissory note constitutes no bar to an action thereon. *Garnier v. Papin*, 243.
  11. The taking of a promissory note does not extinguish an open account; upon the production of the note a recovery may be had on the account. *McMurray v. Taylor*, 263.
  12. Where a note has been taken for an indebtedness evidenced by open account, and a receipt given therefor, a statement in the receipt to the effect that the note was taken "in settlement of the account" would not be sufficient, alone, to authorize the court to submit to the jury, by instruction, the issue whether the note was taken in payment or satisfaction of the account. *Id.*
  13. A promissory note given on Sunday for an antecedent debt is valid and binding. (R. C. 1855, p. —.) *Kaufman v. Hamm*, 387.
  14. Where the payee of a negotiable promissory note endorses the same before maturity, a payment made to him before his endorsement will not extinguish the debt so far as the endorsee is concerned, unless the latter had notice of the payment at the time of such endorsement. *Grant v. Kidwell*, 455.
  15. An antecedent liability incurred by the endorsee of a negotiable promissory note, assigned before maturity, as surety for the payee and endorser, is a sufficient consideration to support the title of such endorsee; the endorsee, however, in such case, is a holder for value, in the sense that will entitle him to recover, against the maker of the note, irrespective of the equities between such maker and the payee, only to the extent of the liability incurred by him as surety for the payee. *Id.*
  16. Where the vendor of land, who has given a title bond only conditioned for the execution of a deed upon the payment of the purchase money, and who has not executed a deed of conveyance to the purchaser,

## BILLS OF EXCHANGE AND PROMISSORY NOTES—(Continued.)

assigns a note given for the purchase money to another, the equitable lien of the vendor will pass to the assignee and he may enforce the payment of the note against the land specifically. *Adams v. Cowherd*, 458.

## BOATS AND VESSELS.

1. Where goods are shipped on board a barge to a port on the western waters, and the barge on the voyage is accidentally grounded and in danger of being lost by the perils of navigation together with the goods on board, and it becomes necessary, for the purpose of saving the barge and lumber from destruction, to unload and reload the same, and the master does so load and reload and take care of the barge and goods when so unloaded, it is a case for contribution, of general average. *Dilworth v. McKelvy*, 149.

## BONA FIDE PURCHASER.

See EQUITY, 3. VENDORS AND PURCHASERS.

## BONDS.

1. To constitute a bond signed by a person a valid bond against him, it must be shown to have been delivered to the obligee. *McPherson v. Meek*, 345.
2. Where a person, alleging that he had as surety for another paid a bond in which the latter was principal, seeks to recover the sum so paid of the alleged principal, he must show that he became a party in the character of surety at the instance of the alleged principal, or that the latter assented to it, unless this fact appear from the instrument itself. *Id.*

## C

## CARE.

See TORTS. TRESPASS. RAILROADS.

1. A servant, who is injured by the negligence or misconduct of his fellow servant, can maintain no action against the master for such injury, unless the servant, by whose negligence the injury is occasioned, is not possessed of ordinary skill and capacity in the business entrusted to them, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. *McDermott v. Pacific Railroad Co.*, 115.
2. A servant of a railway company could not recover against the company for an injury caused by the falling of a bridge, unless such injury was caused by incompetent servants or agents of the company whose employment might be traced to the negligence of the company, or to a defect in the bridge attributable to the fault of the company. *Id.*
3. He who drives a carriage in a crowded street should exercise a due diligence proportionate to the dangerous nature of the employment. *Vaughn v. Scade*, 600.

## CLAIM AND DELIVERY OF PERSONAL PROPERTY.

## See PRACTICE.

1. Where a constable or other officer, previous to the levy of an execution, demands and obtains an indemnification bond of the plaintiff under the first section of the sheriff's and marshal's act of March 3, 1855, (Sess. Acts, 1855, p. 464,) he will be exempt from liability on his official bond at the suit of a claimant of the property levied on and sold other than the defendant, although such claimant may have claimed the property of the officer orally and not in conformity to the third section of said act. *State, to use of, &c., v. Watson*, 122.
2. It is not the failure of the claimant to give notice of this claim to the officer in the form required by the third section of said act that exempts the officer from liability to such claimant; it is the taking of an indemnification bond in conformity to the provisions of the first section of said act. *Id.*
3. The exemption from liability guaranteed to an officer levying an execution by the fifth section of the act of March 3, 1855, (Sess. Acts, 1855, p. 464,) where an indemnification bond has been given as required by that act, extends to an action of replevin brought against such officer. *St. Louis, Alton & Chicago Railroad Co. v. Castello*, 124.
4. Where, in an action for the possession of personal property, under the seventh article of the practice act (R. C. 1855, p. 1242), the plaintiff obtains possession of the property upon giving bond, and fails to prosecute the action with effect, and it appears that the defendant has only a special interest in the property *as against the plaintiff*—for example, a lien thereon for money due from the plaintiff to himself, or a mere claim to possession for a limited period; in such case judgment should not be rendered in favor of the defendant for the return of the property or the payment of the entire value of the property, but the value of the interest of the defendant in the property should be assessed, and judgment should be rendered in favor of the defendant for the value so assessed, or the return of the property until such value be paid, at the option of the defendant. *Dilworth v. McKelvy*, 149.
5. Where the defendant has only a special interest and the plaintiff is a stranger to the title, the entire value may be recovered by the defendant as special owner, and he will be answerable over to the general owner to the extent of the latter's interest; in such case, the general value of the property would be assessed without regard to the value of the special interest. The judgment in each case must be modified by the circumstances, so that the merits of the controversy may, if possible, be settled in one action. *Id.*
6. In suits for the possession of personal property, under the eighth article of the practice act of 1849 (Sess. Acts, 1849, p. 82,) if the defendant gave a forthcoming bond, as allowed by said article, with sureties, judgment could be rendered against the sureties only in the mode pointed out in the ninth section of said article. *Baldwin v. Dillon*, 429.
7. In actions for the possession of personal property, the plaintiff, if he succeed, has the choice of taking the property or its value. By the value of the property is meant its value at the time of its valuation by

## CLAIM AND DELIVERY OF PERSONAL PROPERTY—(Continued.)

the jury. If slaves, for example, are sued for, and they die in the hands of the defendant during suit, the plaintiff has no just claim for more than damages for their detention up to the time of their death. If the depreciation in value or death be produced by ill-treatment or neglect, or the slaves be sold to another, the rule may be different. *Pope v. Jenkins*, 528.

## CONCESSION.

See LANDS AND LAND TITLES.

## CONFLICT OF LAWS.

See MARRIAGE. FRAUD AND FRAUDULENT CONVEYANCES.

1. It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere. *Johnson v. Johnson's Adm'r*, 73.

## CONSTITUTIONAL LAW.

See RAILROADS, 4.

1. The general assembly may authorize a municipal corporation to macadamize streets within its limits, and to apportion and charge the cost of such macadamizing on the adjoining lots in proportion to their front. *City of St. Joseph v. Anthony*, 537.
2. In order to authorize a municipal corporation to recover the amount charged against an adjoining lot on account of the macadamizing of a street, a substantial compliance with the law must be shown; an observance of all the formalities prescribed by the ordinances of the corporation, which are directory, is not required. If the work has been done and in a manner satisfactory to the officer entrusted with its supervision, and has been received by the corporation and paid for, a *prima facie* case is made out. The defendant may show that there has been a neglect of duty on the part of the authorities entrusted with the execution of the work, and if this neglect or omission has injured him, such facts may constitute a defence. *Id.*
3. In all trials in courts of record in which a party is entitled to a jury, the jury must consist of twelve men. The right to demand in such cases a jury of twelve men is a constitutional right. *Vaughn v. Scade*, 600.
4. The provision in the act organizing the St. Louis law commissioner's court prescribing that "in all jury trials in said court the jury shall consist of six lawful jurors, or a less number if the parties shall consent thereto," is unconstitutional; juries in that court, as in all courts of record, must consist of twelve men. (R.C. 1855, p. 1597, § 6.) *Id.*
5. If, however, a trial in said court proceeds with a less number than twelve jurymen, and no exceptions are taken on that ground, a party can not avail himself of the error except by motion in arrest of judgment, which must be made within the time prescribed by law or the rules of court. *Id.*
6. There is nothing in the bill of rights which prevents parties from trying, by consent, their causes in the St. Louis law commissioner's court with six jurors, as provided in the act organizing that court; the consent should always, in such cases, be entered of record. *Id.*

## CONTRIBUTION.

See BOND, 2. GENERAL AVERAGE.

## CONVEYANCE.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS. FRAUD AND FRAUDULENT CONVEYANCES. LANDS AND LAND TITLES. PRACTICE, 31.

1. Where a defendant in ejectment seeks to show an outstanding title in another, and offers in evidence a deed executed by the same parties under whom plaintiffs claim, he may by extrinsic evidence, if the descriptions and calls of the two deeds are different but not repugnant, show that the calls are such as will make the deed under which defendant claims embrace the same land conveyed to plaintiffs. *Schultz v. Lindell*, 310.
2. One A. by deed conveyed to the children of his brother a female slave with her increase; the deed provided that the property conveyed should remain with the wife of said brother for the use and support of herself and said children during her life, or so long as she might "remain his widow" after his death. The deed also further provided that should she have any other children while the wife of said brother, they should be entitled to a share of the property with the children living at the date of the deed; at the death of said wife equal division to be made among the said children. *Held*, that this deed conferred no such interest on the wife as was subject to execution; that the legal title to the slaves was not in her. *McLaurine v. Monroe's Adm'r*, 462.
3. By the third section of the territorial act of February 1, 1817, (1 Terr. Laws, p. 543,) a justice of the peace of Missouri territory was authorized to take acknowledgment of deeds where the lands conveyed lay outside the county of which he was justice. (NAPTON, Judge, *dissenting*.) *Duly v. Brooks*, 515.

## CORPORATIONS.

See RAILROADS.

1. Acts of corporations may be proved in the same manner as the acts of individuals; if there be no record evidence, they may be proved by the testimony of witnesses. *Newman v. Southern Hotel Co.*, 118.
2. *Held*, in a suit on a subscription to the stock of an incorporated company, that it was competent for the defendant to show by oral testimony, in the absence of record evidence, that the subscription list, upon which defendant's name appeared, was annulled and abandoned, and that another subscription was subsequently opened and made the basis of the organization of the company by the stockholders. *Id.*
3. The fact that a corporation has a seal does not prevent its agents from binding it by contracts not under seal. *Buckley v. Briggs*, 452.
4. It does not follow, because a corporation is by its charter prohibited from dealing in commercial paper, that it may not lawfully receive and sell notes given for the sale of its lands. *Id.*

## COSTS.

See PLEADING, 3. PRACTICE, 25.

## COUNTER-CLAIM.

See PLEADING.

## CRIMES AND PUNISHMENTS.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. It is the right and privilege of a jury in a criminal prosecution to determine the facts submitted to them for decision without regard to and uninfluenced by the opinion the judge presiding at the trial may have as to the facts; the judge can not refuse to receive a verdict returned by the jury on the ground that it is manifestly against the evidence. *The State v. Ostrander*, 13.
2. If the verdict returned by a jury in a criminal prosecution be sensible and responsive to the issue, it is the duty of the court to receive it and have it recorded. *Id.*
3. An affirmative verdict of guilty of murder in the second degree is responsive to an indictment for murder in the first degree; and however strong may be the opinion of the judge that such a verdict is unwarranted by the evidence, and although no instructions whatever may have been given bearing upon the law of murder in the second degree, it would be improper for the judge to refuse to receive such a verdict and order it to be recorded. *Id.*
4. Stealing committed in a dwelling-house is grand larceny irrespective of the value of the property stolen, and may be punished as such under the thirty-second section of the third article of the act concerning crimes and punishments. (R. C. 1855, p. 577.) *State v. Ramelsburg*, 26; *State v. Smith*, 114.
5. The twenty-first section of the ninth article of the act concerning crimes and their punishments (R. C. 1855, p. 642) is properly invoked by an accused person only after trial and conviction; the accused should be tried as if he were an adult, and afterwards, upon suggestion, the court should ascertain the age, and if he be found to be under sixteen years of age, the court should adjust the punishment in accordance with the statute. *State v. Gavner*, 44.
6. If a person take and lead away a horse any distance with a felonious intent, the asportation is complete and he is guilty of larceny, although the horse is not removed from the enclosure or lot in which he is at the time of such felonious taking and leading away. *The State v. Gazell*, 92.
7. In the trial of a criminal case, the legal existence of a banking corporation may be proved by general reputation. (R. C. 1855, p. 1193, § 23.) This rule is applicable to the case of a corporation organized under the general banking law of another state. *State v. Fitzsimmons*, 237.
8. Where a statute, on which an indictment is founded, describes or enumerates the offences disjunctively, the indictment, if it contain only one count, should charge them conjunctively if they are not repugnant; as, where the statute makes it an offence to "sell, exchange, or deliver," &c., for any consideration, any falsely made note, &c., it is proper that the indictment should charge the offences conjunctively, that the accused did sell, exchange and deliver, &c. If the offences are not repugnant, the indictment will not be liable to the objection that several offences are joined in the same count. *Id.*
9. It is no defence to an indictment, founded on the ninth section of the

## CRIMES AND PUNISHMENTS—(Continued.)

fourth article of the act concerning crimes and punishments, (R. C. 1855, p. 591, § 9,) for selling, exchanging and delivering to another certain falsely made, forged and counterfeit bank notes of a certain denomination, that the bank named never issued genuine bills of the character or denomination of those described in the indictment. *Id.*

10. To constitute a sale or exchange within the meaning of the said section, it is not necessary that the accused should have parted with his entire interest in the counterfeit paper for a consideration paid; the transaction would, it seems, be within the statute though the sale should be on credit, or, if there were a delivery, if it were understood that they should be returned in case they were not sold. *Id.*
11. Perjury is, by statute, a felony. An indictment for perjury must charge that the act of false swearing was done feloniously. *State v. Williams*, 364.
12. It is the province of the court, and not of the jury, to determine whether the fact sworn to was material in the judicial proceeding in which the perjury is alleged to have been committed. *Id.*
13. In trials for perjury it is improper to instruct the jury that the law presumes the declarations of a party against himself to be true, when the object of such an instruction is to make the declarations evidence of the falsity of the oath. The weight of such declarations is to be determined by the jury. Of themselves they are not sufficient to convict one of perjury. *Id.*
14. In an indictment for perjury, the false swearing must be charged to have been done feloniously. *State v. Terry*, 368.
15. Grand jurors may indict on their own information or knowledge; they may indict a person for perjury in testifying before themselves. *Id.*
16. A person may commit perjury by falsely swearing, before a grand jury, that he did not know of any person who had, within twelve months, bet any money or property upon any game of cards in the county. *Id.*
17. An indictment is rendered bad by reason of the omission of the words: "against the peace and dignity of the state." *State v. Pemberton*, 376.
18. The concluding clause of the twenty-seventh section of the fourth article of the act regulating proceedings in criminal cases, (R. C. 1855, p. 1176, § 27,) providing that no indictment shall be deemed invalid, nor the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits," should, at least, be limited in its application to imperfections of the class previously enumerated in said section. *Id.*
19. An indictment for murder, after charging an assault by the accused upon one H. D. and the felonious infliction of a mortal wound upon the latter by stabbing with a knife, whereof the said H. D. died, concluded as follows: "And so the jurors aforesaid, upon their oaths aforesaid, do say that the said C. H. P., in manner and form and by the means aforesaid, feloniously, wilfully, maliciously, deliberately, premeditatedly, on purpose, and of his malice aforethought, did kill and murder; contrary to the form of the statute, and against the peace and dignity

## CRIMES AND PUNISHMENTS—(Continued.)

of the state. *Held*, that the indictment was bad, inasmuch as it did not designate the person murdered. *Id.*

20. Where a person is indicted for a felonious assault and is acquitted, the acquittal is a bar to any further proceedings; an appeal can not be prosecuted to the supreme court by the State. *State v. Palmer*, 385.
21. An indictment charging that the defendant on, &c., at &c., "did then and there feloniously assault one J. D. with a certain handle of a hoe, a deadly weapon, by feloniously assaulting and striking him, the said D., with the said hoe handle, with intent, in so doing, him the said D. then and there feloniously to maim, wound and disfigure, contrary," &c., is a good indictment under the thirty-eighth section of the second article of the act concerning crimes and punishments. A felonious maiming is a felony. *State v. Thompson*, 470.
22. An indictment charging that the defendant, "at, &c., on, &c., feloniously, burglariously, and forcibly did break into and enter a certain meat-house and building, the property of one B., then and there being, by forcibly breaking the lock and door thereof, in which said meat-house and building there were then and there, at the time aforesaid, goods, wares and merchandise, and other valuable things, kept and deposited; and that the said H. so brake into and entered said meat-house and building, as aforesaid, with intent then and there to commit a larceny, by then and there feloniously stealing, taking and carrying away the goods, chattels and personal property of the said B.; and five pieces of pork, &c., [describing the articles and giving their values;] all of the goods, chattels and personal property and valuable things of the said B., then and there being found in said meat-house and building, he, the said H., did then and there feloniously steal, take and carry away, contrary," &c., is a good indictment under the sixteenth section of the third article of the act concerning crimes and punishments. (R. C. 1855, p. 573, § 16.) *The State v. Henley*, 509.
23. Where a person is prosecuted for both burglary and larceny in the same indictment, and is convicted of both offences, he may, under the nineteenth section of the third article of the act concerning crimes and punishments (R. C. 1855, p. 574), be punished by imprisonment in the penitentiary, in addition to the punishment prescribed for the burglary, not exceeding five years. The jury would be authorized in such case to assess the punishment for the larceny, in addition to that for the burglary, at any period not exceeding five years. *Id.*
24. A declaration made by a child two days before its death to a person who inquired of him the cause of the swollen appearance of his face, that "papa did it," *held* to be inadmissible in evidence against the father on his trial for the murder of the child, the declaration not being a part of the *res gestæ*, nor being made in *articulo mortis*. *State v. Dominique*, 585.

## CURRENCY.

See BANKERS.

## D

## DAMAGES.

See SLANDER, 3.

1. Wherever the jury is authorized, in a case of unliquidated damages, to allow interest in estimating the damages, the interest is not recoverable as such in addition to the damages assessed by the jury, but must enter into the estimate made by the jury and be found as a part of the damages assessed. *Dozier v. Jermain*, 216.
2. An action to recover damages for trespass to land can be maintained upon possession alone. Where the possession of the plaintiff is admitted, the defendant may put in issue his possessory right, but to sustain such a defence he must show a superior right in himself or in another under whom he claims. If the defendant be a mere intruder he can not, the plaintiff's possession being admitted or proven, show a want of title in the plaintiff. *Reed v. Price*, 442.
3. Where the plaintiff, in an action for trespass to land, claims in his petition ownership and possession, and the possession is admitted or proven, the defendant, if he be a mere intruder, can not be permitted to introduce evidence to show a want of title in the plaintiff in mitigation of damages. *Id.*
4. In actions for the possession of personal property, the plaintiff, if he succeed, has the choice of taking the property or its value. By the value of the property is meant its value at the time of its valuation by the jury. If slaves, for example, are sued for, and they die in the hands of the defendant during suit, the plaintiff has no just claim for more than damages for their detention up to the time of their death. If the depreciation in value or death be produced by ill-treatment or neglect, or the slaves be sold to another, the rule may be different. *Pope v. Jenkins*, 528.
5. A. at St. Louis shipped flour consigned to B. in Boston. C. at New Orleans, to whom said flour was shipped to be forwarded by him to B. in Boston, wrongfully converted the same. Held, in a suit brought by B. against C., that the measure of damages was the value of the flour at the place of destination. *Farwell v. Price*, 587.

## DELIVERY.

See BONDS.

## DEMAND.

See PLEADING, 3.

## DESCENTS AND DISTRIBUTIONS.

1. At common law a bastard had no inheritable blood; he could transmit an estate by inheritance only to the heirs of his body; if he died without issue and intestate leaving real estate, it escheated to the state. *Bent's Adm'r v. St. Vrain*, 268.
2. The common law disabilities attaching to bastards with respect to their power of inheriting or transmitting by descent still attach to them in this state except so far as they have been removed by the provision

DESCENTS AND DISTRIBUTIONS—(*Continued.*)

- that "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother." (R. C. 1845, p. 422.) *Id.*
3. This provision does not render a bastard capable of transmitting an estate by descent to his mother or to his illegitimate brothers. *Id.*
  4. One A. died in 1848 in New Mexico, leaving two illegitimate children, B. and C., the children of the same mother. He devised certain real estate in Missouri to said children. B. died leaving said C. and the mother surviving. Letters of administration were taken out upon the estate of A., and on final settlement a sum of money arising from the accruing rents of said real estate remained in the hands of the administrator. *Held*, that B. could transmit his portion of the estate by descent neither to his mother nor to C., his brother; that B.'s estate escheated to the state. *Id.*

## E

## EMANCIPATION.

See SLAVERY.

## EQUITY.

See PRACTICE, 30, 31. FRAUD AND FRAUDULENT CONVEYANCES.  
SPECIFIC PERFORMANCES.

1. A. became possessed and took charge of two slaves and a certain amount of money as a trust fund for the benefit of his sister; he appropriated the money and the proceeds of the sales of the negroes to the purchase of a tract of land in this state, and in removing his sister and her family from Kentucky to this state; this purchase was made in good faith, and the property was subsequently conveyed to the sister and her children in satisfaction of the trust, and was occupied by them until the death of the mother, and was afterwards divided by proceedings in partition among her heirs. *Held*, in a suit instituted many years after the date of the original transaction, that there was no claim in equity against A. or his estate growing out of the receipt of the trust fund. *Hickman v. Wood's Exec'r*, 199.
2. Where property is conveyed in trust, *bona fide*, to secure the payment of certain debts due, and a third person, by virtue of a sale under a judgment against the grantor in the deed of trust, subsequently obtains title, subject to such deed of trust, to a portion of the property embraced in said deed, such purchaser will not be entitled to intervene in proceedings instituted to enforce the deed of trust against all the property embraced in it, and to require that that part of the property in which he has no interest shall first be appropriated to the payment of the trust debt. *Fleshman v. Shepard*, 324.
3. One B. held a receipt issued to him by the receiver of the United States land office upon the entry by him of a tract of forty acres; also the register's certificate of the location by him of a military land warrant. No patents had been granted by the United States. B. assigned

## EQUITY—(Continued.)

- said receiver's receipt to W. by written endorsement as follows: "For value received, I assign the within to W. as collateral security, this 15th day of May, 1857. [Signed] B." At the same time he assigned the register's certificate by an endorsement identical with the above, with the exception that it was assigned "as counter security." *Held*, that parol evidence might be adduced to show that these assignments were made to secure two certain promissory notes executed by said B. in favor of said W.; that the said assignments created an equitable lien or mortgage in favor of W. upon the lands embraced in said receipt and certificate. *Wallace v. Wilson*, 335.
4. To entitle a person to invoke the aid of the rule that protects a *bona fide* purchaser as against a prior equity, it must appear that he made his purchase and paid the purchase money before he had knowledge of such prior equity; he should in his answer be full and explicit as to the time and terms of his purchase, and the payment of the purchase money. *Id.*
  5. The doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of a compromise, a court of equity will grant him relief, is to be understood with many qualifications; family compromises upon doubted, if not doubtful, rights and mutual claims and mutual ignorance of the law, are generally sustained by the courts; to authorize the courts to grant relief there should, it seems, be something more than mere ignorance of the law; there should be imposition or undue influence. *Faust's Adm'r v. Birner*, 414.
  6. Where a party seeks the specific enforcement of a contract to convey land, and a third person, not a party to such suit as originally instituted, who claims the same land by an alleged superior title under the person against whom such specific enforcement is sought, desires to be made a party, he may well be permitted to come in and defend; if a decree as between the original parties to the suit would affect his rights injuriously—as by casting a shadow on his title—he would have a *right* to be heard. *Carter v. Mills*, 432.
  7. One M., residing in the year 1856 in the state of California, owned certain lots adjoining the city of St. Joseph, Missouri. He had in St. Joseph an agent authorized to sell said lots for a specific sum. An uncle of M., a surgeon in the United States army, stationed at Fort Columbus, New York harbor, was also made acquainted with his wish to dispose of said lots. An offer by one G. to purchase said lots was transmitted through said uncle to M. in California. M. thereupon executed a deed dated in California, October 6, 1856, conveying said lots to G., and forwarded the same by mail to the uncle at Fort Columbus, where it was received by him about December 1, 1856, and immediately handed over to Gibbs upon his paying the purchase money. In the mean time, the agent of M. at St. Joseph had, on the 20th of October, 1856, in good faith, entered into a written contract to sell said lots to one C. C., on the 29th of Nov'r, 1856, instituted a suit against M. for

## EQUITY—(Continued.)

- the specific enforcement of this contract. M., being a nonresident, was notified by publication, but made default. G., on his own motion, was admitted to defend, against the objection of the plaintiff. *Held*, that G. was, under the circumstances, properly admitted to defend; that having the legal title and a prior equity—the acceptance of the offer of G. being prior to the contract with C.—his title would prevail over the naked agreement to convey to C. *Id.*
8. The vendor of an equitable title has a lien for the unpaid purchase money to the same extent as the vendor of the legal title. *Bledsoe v. Games*, 448.
  9. One who purchases property from another, knowing that the vendor has no right to the same and that another claims it, may, in equity, be treated as a trustee for the true owner. The owner may also maintain an action at law in the nature of an action of trespass. *McLaurine v. Monroe's Adm'r*, 462.
  10. One P., in Kentucky, in the year 1843, being insolvent, mortgaged his property, including a slave named Ellen, to secure certain liabilities. No proceedings to foreclose the mortgage were instituted, but the mortgagees set up the property for sale at public auction, P. being present and consenting to the course pursued. The mortgagees purchased the slave Ellen at this sale, took and kept possession of her for two years and then sold her to one M. for a full price. M. gave said Ellen to the children of P. in 1846, and executed a deed to them in 1850, which was duly recorded in Kentucky. In 1851 P. moved with his family to Missouri, and in the same year sold said slave to one J. *Held*, in a suit for the possession of said slave and her increase, brought by the children of P. against said J., that, whether P.'s equity of redemption was extinguished or not by the sale by the mortgagees in Kentucky, the legal title was in the plaintiffs; that such equity of redemption, if unextinguished, did not stand in the way of a recovery by plaintiffs, the defendant not wishing to redeem. *Pope v. Jenkins*, 528.
  11. A bill of peace to quiet title can not be maintained where the title has not been called in question in actions at law in the nature of actions of ejectment. *Marmaduke v. Hannibal & St. Joseph Railroad Co.*, 545.

## ESCHEAT.

See DESCENTS AND DISTRIBUTIONS.

## ESTOPPEL.

1. There may be an *estoppel in pais* as to the boundary line between two adjoining proprietors although no express agreement may have been made between them as to the location actually made; nor is it essential that the proprietor claiming the benefit of the estoppel should enclose up to the line; it is sufficient, if it would work a practical fraud upon him, to allow the other to disturb a location made, and acquiesced in, by himself. *Lindell v. McLaughlin*, 28.
2. The doctrine that possession of part is possession of the whole is inapplicable to such a case. *Id.*

## EVIDENCE.

See MARRIAGE. EQUITY, 3. JUDGMENTS OF SISTER STATES. INSURANCE, 8. PRINCIPAL AND AGENT, 3.

1. Where the legitimacy of children is called in question, especially after their death, and after a great lapse of time, every reasonable presumption should be indulged in in favor of legitimacy; very slight circumstances are sufficient to authorize a court or jury to find the existence of a marriage. *Johnson v. Johnson's Adm'r*, 73.
2. The admission of testimony that is merely irrelevant, and which could not have influenced the jury in forming their verdict, is no ground for the reversal of a judgment by the supreme court. *Picker v. Haidorn*, 92.
3. Acts of corporations may be proved in the same manner as the acts of individuals; if there be no record evidence, they may be proved by the testimony of witnesses. *Southern Hotel Co. v. Newman*, 118.
4. *Held*, in a suit on a subscription to the stock of an incorporated company, that it was competent for the defendant to show by oral testimony, in the absence of record evidence, that the subscription list, upon which defendant's name appeared, was annulled and abandoned, and that another subscription was subsequently opened and made the basis of the organization of the company by the stockholders. *Id.*
5. Parol evidence is inadmissible to incorporate with a written instrument an oral agreement made contemporaneously with such instrument. *Walter v. Engler*, 130.
6. The affidavits and accounts of loss constituting the preliminary proofs furnished by the insured to the insurance company are evidence that the insured has complied with the stipulations of the policy in this respect; they are not evidence in favor of the insured as to the amount of the loss. *Newmark v. Liverpool & London Fire & Life Insurance Co.*, 160.
7. The admissibility of the testimony of skilled witnesses is, as a general rule, confined to a case where, from the nature of the subject, facts disconnected from such opinions can not be so presented to the jury as to enable them to pass upon the question with the requisite knowledge and judgment. *Id.*
8. Recitals in a deed of conveyance are not evidence in behalf of the persons claiming under the deed. *Fine v. St. Louis Public Schools*, 166.
9. A. served as mate on board a steamboat from April, 1854, to August, 1854, when the boat was laid up. When the boat stopped running, a portion of A.'s wages was due him. The boat commenced running again in October, and continued until December, 1854, A. serving as mate. As late as December only a portion of the wages due for services rendered previous to August was paid. A. also served as mate on board said boat from March, 1855, to July, 1855. The receipts entered in the books of the boat during this last mentioned period showed that A. was paid in full for each trip of the boat. *Held*, that upon these facts there was no legal presumption of the payment of the sum due A. when the boat was laid up in August, 1854. *Bougher v. Kimball*, 193.
10. A. executed a negotiable note in favor of B. The note was endorsed

## EVIDENCE—(Continued.)

- by B. in blank. This endorsement was made by C. as agent of B., and under or following the name of B. was the following: "Without recourse, C." D., the person to whom the note was thus endorsed, transferred the same for value to E. *Held*, inasmuch as B.'s endorsement seemed to be unqualified and such as to attach to him a general liability, that it was immaterial what understanding may have existed between C. and D.; it could constitute no defence to B. as against E., a subsequent *bona fide* holder, without notice of such agreement. *Lawrence v. Dobyys*, 196.
11. Where a note is made payable at a particular place, presentment at that place is sufficient in order to charge an endorser; the holder is not bound to present it elsewhere or personally to the maker. *Id.*
  12. It is discretionary with the courts to relax the rules of evidence as to the order of examining witnesses or introducing testimony; material testimony should not be excluded because offered after the testimony is closed, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. *Dozier v. Jernain*, 216.
  13. A party to a suit is entitled to examine as a witness any of the adverse parties thereto. (R. C. 1855, p. 1577, § 3.) *Fagan v. Long*, 222.
  14. By the act of February 12, 1857, (Sess. Acts, 1857, p. 181,) "a party may be examined as a witness in behalf of his co-plaintiff or of a co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. *Garnier v. Lebeau*, 229.
  15. Where a continuance was applied for in behalf of several defendants in a cause on the ground of the absence of a co-defendant alleged to be a material witness in their behalf; *held*, that the motion was properly overruled on the ground that it did not appear, but that all the defendants were interested in the defence which the testimony of the said co-defendant was expected to support. *Id.*
  16. Where the defence relied upon is a joint defence, upon which all the defendants rely, one defendant can not be permitted, under the act of February 12, 1857, (Sess. Acts, 1857, p. 181,) to testify in behalf of his co-defendants. *Scheifer v. Kahlman*, 232.
  17. The supreme court will not grant new trials on the ground that the verdicts are against the weight of evidence. *Rider v. Springmeyer*, 234.
  18. In the trial of a criminal case, the legal existence of a banking corporation may be proved by general reputation. (R. C. 1855, p. 1193, § 23.) This rule is applicable to the case of a corporation organized under the general banking law of another state. *State v. Fitzsimmons*, 237.
  19. Where a creditor in stating an account between himself and his debtor gives a credit therein to the latter by mistake, or is induced to give such credit on terms and conditions that are not afterwards complied with by the debtor, he ought to be permitted to avail himself of these facts in a suit against the debtor to recover the item for which the credit was allowed. *Moore v. Albright*, 249.
  20. The solemn declarations made by a party to a suit in his petition or answer, are, if pertinent, admissible in evidence against him in behalf

## EVIDENCE—(Continued.)

- of persons not parties to the suit, not by way of estoppel, but by way of admission. *Warfield v. Lindell*, 272.
21. Where a defendant in ejectment seeks to show an outstanding title in another, and offers in evidence a deed executed by the same parties under whom plaintiffs claim, he may by extrinsic evidence, if the descriptions and calls of the two deeds are different but not repugnant, show that the calls are such as will make the deed under which defendant claims embrace the same land conveyed to plaintiffs. *Schultz v. Lindell*, 310.
  22. The opinion of a surveyor as to the proper location of a grant or conveyance of land is inadmissible in evidence to determine such location. *Id.*
  23. In trials for perjury it is improper to instruct the jury that the law presumes the declarations of a party against himself to be true, when the object of such an instruction is to make the declarations evidence of the falsity of the oath. The weight of such declarations is to be determined by the jury. Of themselves they are not sufficient to convict one of perjury. *State v. Williams*, 364.
  24. Whether leading questions may be put to witnesses testifying in a cause is discretionary with the court; so also whether the answers to leading questions in depositions shall be received. *Smith v. Hutchings*, 380.
  25. A declaration made by a child two days before its death to a person who inquired of him the cause of the swollen appearance of his face, that "papa did it," held to be inadmissible in evidence against the father on his trial for the murder of the child, the declaration not being a part of the *res gestæ*, nor being made in *articulo mortis*. *State v. Dominique*, 585.
  26. To authorize one defendant to testify in behalf of his co-defendant, his testimony must be such as will not weigh in his own behalf; it should bear upon some special defence peculiar to such co-defendant. *Vaughn v. Scade*, 600.

## EXECUTION.

See SHERIFF.

1. Where a constable or other officer, previous to the levy of an execution, demands and obtains an indemnification bond of the plaintiff under the first section of the sheriff's and marshal's act of March 3, 1855, (Sess. Acts, 1855, p. 464,) he will be exempt from liability on his official bond at the suit of a claimant of the property levied on and sold other than the defendant, although such claimant may have claimed the property of the officer orally and not in conformity to the third section of said act. *State, to use of, &c., v. Watson*, 122.
2. It is not the failure of the claimant to give notice of this claim to the officer in the form required by the third section of said act that exempts the officer from liability to such claimant; it is the taking of an indemnification bond in conformity to the provisions of the first section of said act. *Id.*
3. The exemption from liability guaranteed to an officer levying an execution by the fifth section of the act of March 3, 1855, (Sess. Acts, 1855, p. 464,) where an indemnification bond has been given as required by

## EXECUTION—(Continued.)

- that act, extends to an action of replevin brought against such officer. *St. Louis, Alton & Chicago Railroad Co. v. Castello*, 124.
4. The provision of the act regulating executions (R. C. 1845, p. 481, § 28,) directing the sheriff to divide real estate levied on and sell so much thereof as will be sufficient to satisfy the execution, is directory; a violation of its injunctions will not render the sale void. *Fine v. St. Louis Public Schools*, 166.

## EXPERTS.

See EVIDENCE, 22.

## F

## FARMERS' BANK OF MISSOURI.

See TAXATION.

## FRAUD AND FRAUDULENT CONVEYANCES.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS. ESTOPPEL.

1. Inadequacy of consideration for the conveyance of land is not, of itself, a sufficient ground of relief, unless it is so gross as to raise a presumption of fraud. *Moriso v. Philliber*, 145.
2. Where a person, owning real estate of the value of three thousand five hundred dollars, but who had no knowledge of its value, was illiterate, being able neither to read nor write, was induced by a person, in whom she had confidence and who acted in a double capacity as agent for both parties, to dispose of said real estate to another for seventy-five dollars; held, that the transaction was stamped with fraud, and the facts would warrant a decree setting aside the conveyance on the ground of fraud. *Id.*
3. If a third person voluntarily convey a chattel to a trustee in trust for the separate use of the wife of another, it will be held free and clear of all claims of the creditors of the husband; to constitute the transaction fraudulent as against the creditors of the husband, the consideration must come from the husband. *Bay v. Sullivan*, 191.
4. The settlements and allowances of a guardian in a probate court in the matter of his guardianship have the force and effect of judgments, and can be set aside in an equitable proceeding against him only upon proof that they were procured by fraud. *Brent v. Grace's Adm'r*, 253.
5. Upon such an issue it is no proof of fraud in procuring the allowances that the guardian made expenditures for the maintenance and education of his ward without first procuring an appropriation by the probate court; the allowance of an account for expenditures already made satisfies the statute. (R. C. 1855, p. 826, § 24.) *Id.*
6. If a guardian, instead of expending the money of his ward for the latter's maintenance and education, gives his individual note therefor, and receives receipts from the creditor, and procures a credit therefor in his settlement with the probate court, this will not constitute fraud as against the ward; the ward, in such case, would not, it seems, be liable for the debt. *Id.*

## FRAUD AND FRAUDULENT CONVEYANCES—(Continued.)

7. Where a deed of assignment of goods is, on its face, in trust to the use of the grantor therein, it is fraudulent and void as against creditors, existing and subsequent, and purchasers; and the courts will so declare as a matter of law. *Johnson v. McAllister, Assignee*, 327.
8. Where, however, the deed is not void on its face, and extrinsic evidence is adduced to show it to be fraudulent, the court will submit the issue of fraud, under proper instructions, to the jury, who will determine, as a matter of fact, whether the deed is fraudulent or not. *Id.*
9. The fact that a deed of assignment gives the assignee the privilege of selling the assigned goods on a credit does not render the deed void on its face. *Id.*
10. The thirty-ninth section of the act concerning voluntary assignments (R. C. 1855, p. 210) does not prevent a debtor from assigning his property for the benefit of a portion only of his creditors; said section operates to invalidate all provisions in such assignments which give preferences among the designated creditors; the designated creditors are entitled to be paid *pro rata* out of the proceeds of the assigned property. *Id.*
11. The reservation to the grantor in a deed of assignment for the benefit of certain designated creditors of any surplus there may be after the payment of the debts of such preferred creditors does not render the deed void on its face. *Id.*
12. The fourth section of the act concerning fraudulent conveyances, (R. C. 1845, p. 526; R. C. 1855, p. 803,) making conveyances of chattels void as to creditors and purchasers unless accompanied by possession in the grantee or unless duly recorded, as there directed, has no extra territorial operation; it does not apply to deeds made in another state, where all the parties to them and the property conveyed by them are located at the date of their execution. If the deed is valid by the law of the place where made, it is valid in this state. *Smith v. Hutchings*, 380.
13. A mortgage or deed of trust of personal property is valid between the parties thereto, although possession may not accompany the deed, and no record be made thereof. *Johnson v. Jeffries*, 423.
14. The eighth section of the act concerning fraudulent conveyances, (R. C. 1855, p. 804,) providing that no mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession thereof be delivered to and retained by the mortgagee, or trustee, or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded, can not be invoked by all persons indiscriminately, whether trespassers or wrongdoers; to entitle a person to invoke the aid of this provision against the mortgagee, or trustee, or *cestui que trust*, he must show himself related in some way to the parties to the instrument. *Id.*
15. Where a debtor deposits personal property in the hands of another as bailee with a view fraudulently to protect it from his creditors, such bailee can not avail himself of such fraudulent intent to defeat an action brought against him by the debtor for the recovery of such property. *Gowan's Adm'r v. Gowan*, 472.

## G

## GENERAL AVERAGE.

1. Where goods are shipped on board a barge to a port on the western waters, and the barge on the voyage is accidentally grounded and in danger of being lost by the perils of navigation together with the goods on board, and it becomes necessary, for the purpose of saving the barge and lumber from destruction, to unload and reload the same, and the master does so load and reload and take care of the barge and goods when so unloaded, it is a case for contribution, of general average. *Dilworth v. McKelvy*, 150.

## GRAND JURORS.

See CRIMES AND PUNISHMENTS.

1. Grand jurors may indict on their own information or knowledge; they may indict a person for perjury in testifying before themselves. *State v. Terry*, 368.

## GUARDIAN.

1. The settlements and allowances of a guardian in a probate court in the matter of his guardianship have the force and effect of judgments, and can be set aside in an equitable proceeding against him only upon proof that they were procured by fraud. *Brent v. Grace's Adm'r*, 253.
2. Upon such an issue it is no proof of fraud in procuring the allowances that the guardian made expenditures for the maintenance and education of his ward without first procuring an appropriation by the probate court; the allowance of an account for expenditures already made satisfies the statute. (R. C. 1855, p. 826, § 24.) *Id.*
3. If a guardian, instead of expending the money of his ward for the latter's maintenance and education, gives his individual note therefor, and receives receipts from the creditor, and procures a credit therefor in his settlement with the probate court, this will not constitute fraud as against the ward; the ward, in such case, would not, it seems, be liable for the debt. *Id.*

## H

## HUSBAND AND WIFE.

See MARRIAGE.

## I

## INADEQUACY OF CONSIDERATION.

See EQUITY. FRAUDULENT CONVEYANCES.

## INDIAN MARRIAGES.

See MARRIAGE.

## INFANTS.

See PRACTICE, 32, 33, 34.

## INHERITABLE BLOOD.

See DESCENTS AND DISTRIBUTIONS.

## INSTRUCTIONS.

See PRACTICE.

## INSURANCE.

1. Where the freight list of a steamboat on a proposed trip or voyage is insured against a total loss only, the policy will cover the freight pending at the time of loss, although some freight may have been previously earned by the delivery of goods at intermediate ports. *Willard v. Millers' & Manufacturers' Insurance Co.*, 35.
2. If a steamboat, whose freight list is insured against a total loss only, meets with a disaster upon the contemplated trip, and can not be repaired in a reasonable time to transport the cargo, and the master is unable to send the cargo forward to its place of destination for a sum less than the original freight, there will be a total loss on freight within the meaning of the policy. *Id.*
3. In order that a policy of insurance may be binding upon the insurer, it must be accepted by the insured. *Wallingford v. Home Mutual Fire and Marine Insurance Co.*, 46.
4. The charter of a mutual fire insurance company declared that the applicant for insurance "shall, before he receives his policy, deposit his promissory note, &c., a part not exceeding ten per cent. of which shall be immediately paid." The by-laws provide that "policies shall take effect at 12 o'clock, noon, on the day of approval at the office of the company, and shall be binding thereafter, provided the premium or ten per cent. tax on the premium note has been paid," and that "ten per cent. of the premium note shall be paid in all cases and endorsed on the policy." *Held*, that the giving of the note and payment of the prescribed ten per cent. were conditions precedent to the taking effect of a policy. *Id.*
5. Where a boat was insured on time, with the privilege of navigating the usual waters of the Mississippi, Ohio, Tennessee, Illinois and Cumberland rivers, with a proviso in the policy that she should not engage in the "cotton trade;" *held*, that engaging in the trade between Memphis and New Orleans, and adapting the boat to the carriage of cotton, making five or six trips loaded with cotton, advertising her as a regular packet between these points, was engaging in the cotton trade, and a loss by fire, when at the wharf in Memphis, although not a pound of cotton was on board, was a loss not covered by the policy. *Gaty v. Phenix Insurance Co.*, 56.
6. A concealment of facts by an applicant for insurance of a building against fire is not material unless a disclosure of the facts concealed would have induced the insurer to decline the risk or enhance the premium. *Boggs & Leathe v. American Insurance Co.*, 63.
7. In contracts of fire insurance, it is sufficient if the applicant for insurance make true and full answers to the questions put to him by the insurer in respect to the subject of insurance; he is not answerable for an omission to mention the existence of other facts about which no in-

## INSURANCE—(Continued.)

- quiry is made, unless he knows such facts to be material and intentionally fails to communicate them. *Id.*
8. Statements made to insurers in respect to the subject of insurance can not be invoked against the insurers to overthrow the defence of a fraudulent concealment of material facts unless such statements were made in connection with the application for insurance. *Id.*
  9. The liability of an insurance company for losses by thefts occurring at the time of a fire is not restricted to such losses occurring during the continuance of the fire merely; if the loss by theft be occasioned directly by the fire, the insurer will be liable though it happen after the extinguishment of the fire. *Newmark v. Liverpool and London Fire and Life Insurance Co.*, 160.
  10. The affidavits and accounts of loss constituting the preliminary proofs furnished by the insured to the insurance company are evidence that the insured has complied with the stipulations of the policy in this respect; they are not evidence in favor of the insured as to the amount of the loss. *Id.*

## J

## JUDGMENTS.

1. Where there is a right of action against several, a mere judgment against one without satisfaction is no discharge of the others. *McLaurine v. Monroe's Adm'r*, 462.

## JUDGMENTS OF SISTER STATES.

1. A transcript of the proceedings of a court of Indiana had appended thereto a certificate of the clerk, in which he certified said transcript to be "a full, true and complete transcript of all the proceedings had in the above case, as now remains of record and on file in my office." The judge of the court certified the certificate and attestation of the clerk to be "in due form." *Held*, that the transcript was duly authenticated under the act of Congress. *Grover v. Grover*, 400.
2. In an action on a judgment of a sister state, the validity of such judgment under the law of such sister state can not be called in question; if the judgment be erroneous, it can only be vacated in a direct proceeding instituted for that purpose to the court in which it was rendered. *Id.*
3. A decree rendered in a sister state without due notice to the defendant is not binding upon him in this state, nor can it be evidence against him for any purpose as a decree. A general objection to the admission of such a decree as evidence is sufficient. *McLaurine v. Monroe's Adm'r*, 462.

## JURISDICTION.

See MANDAMUS. JUSTICES' COURTS.

## JURORS.

See PRACTICE.

1. The inhabitants of the city of St. Louis are incompetent jurors in a case in which the city is interested as party; for example, in a case in which

## JURORS—(Continued.)

the Board of President and Directors of the St. Louis Public Schools is a party. In such case the court should disregard the special act of March 5, 1855, (Sess. Acts, 1855, p. 527,) and direct the summoning, by special venire, of a jury from that portion of the county outside of the city limits. *Fine v. St. Louis Public Schools*, 166.

## JURY.

See CRIMES AND PUNISHMENTS, 1, 2, 3.

1. In all trials in courts of record in which a party is entitled to a jury, the jury must consist of twelve men. The right to demand in such cases a jury of twelve men is a constitutional right. *Vaughn v. Scade*, 600.
2. The provision in the act organizing the St. Louis law commissioner's court prescribing that "in all jury trials in said court the jury shall consist of six lawful jurors, or a less number if the parties shall consent thereto," is unconstitutional; juries in that court, as in all courts of record, must consist of twelve men. (R.C. 1855, p. 1597, § 6.) *Id.*
3. If, however, a trial in said court proceeds with a less number than twelve jurymen, and no exceptions are taken on that ground, a party can not avail himself of the error except by motion in arrest of judgment, which must be made within the time prescribed by law or the rules of court. *Id.*
4. There is nothing in the bill of rights which prevents parties from trying, by consent, their causes in the St. Louis law commissioner's court with six jurors, as provided in the act organizing that court; the consent should always, in such cases, be entered of record. *Id.*

## JUSTICES' COURTS.

1. A party may give jurisdiction to a justice of the peace by a voluntary renunciation of a part of his demand. It matters not in what way the reduction of the demand is made, so the amount claimed is within the jurisdiction of the justice. *Denny v. Echelkamp*, 140.
2. Justices of the peace have no jurisdiction of actions for torts—as for unlawfully taking and detaining personal property—where the damages claimed amount to ninety dollars. *Ahern v. Carroll*, 200.
3. Where one of two defendants does not join in an appeal from a justice of the peace, the appellate court may, on proper motion, order a severance. *Fagan v. Long*, 222.
4. All the acts which, from the beginning to the end of a suit, the law requires a justice of the peace to perform, are, it seems, to be regarded as judicial and as involving only that responsibility which attends all judicial officers; in issuing an execution, a justice of the peace is not to be held responsible as a mere ministerial officer. *Wertheimer v. Howard*, 420.
5. A judgment was obtained before a justice of the peace; the justice issued execution thereon by direction of the plaintiff, but made the same returnable in sixty instead of ninety days, as required by law, by reason of which the plaintiff lost, and became unable to make, the amount of the debt out of the defendant. *Held*, in an action against the justice to recover damages for the negligent and illegal issue of the exe-

JUSTICES' COURTS—(*Continued.*)

- cution, that the justice was not liable; that the act of the justice was to be regarded as judicial and not ministerial merely. *Id.*
6. Justices of the peace have jurisdiction of actions for the recovery of specific personal property not exceeding the value of fifty dollars. *Butler v. Ivie*, 478.
  7. If a plaintiff, to give the justice jurisdiction of an action for the possession of specific personal property, allege the value thereof to be fifty dollars, the action may be defeated by showing that the value of the property, upon a just estimate, would exceed fifty dollars. *Id.*
  8. A justice of the peace has no jurisdiction over actions for injuries to personal property, wherein the damages claimed exceed fifty dollars; nor can the plaintiff give jurisdiction in such case by waiving the tort in his statement and setting forth that he sues in assumpsit. *Webb v. Tweedie*, 488.
  9. Objection to the jurisdiction of the justice on this ground may be made for the first time in the circuit court on appeal. *Id.*
  10. On the appeal of a cause from a justice of the peace, the same cause of action, and no other, is to be tried in the appellate court that was tried in the court below. If the justice had no jurisdiction because the damages claimed for injuries to personal property exceeded fifty dollars, the plaintiff would not be entitled in the appellate court to amend by changing the sum claimed to fifty dollars. *Id.*
  11. By the third section of the territorial act of February 1, 1817, (1 Terr. Laws, p. 543,) a justice of the peace of Missouri territory was authorized to take acknowledgment of deeds where the lands conveyed lay outside the county of which he was justice. (NAPTON, Judge, *dissenting.*) *Duly v. Brooks*, 515.
  12. Where in the case of an appeal from a justice of the peace the appeal bond affords ample security, it is improper to require the appellant to file an additional bond. *Reed v. Leffingwell*, 543.
  13. Justices of the peace have jurisdiction of actions brought by laborers against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Grannahan v. Hannibal & St. Joseph Railroad Co.*, 546.

## L

## LANDLORD AND TENANT.

1. Where it is stipulated in a lease that in case any of the covenants are broken by the lessee, "the term shall become null and void at the option of the lessor," the term does not become ended absolutely by a breach of a covenant; it is only voidable at the option of the lessor; he must do some act declaring or claiming a forfeiture. *Walker v. Engler*, 130.
2. So, where it was stipulated that the lessee would pay double rent for all the time the lessor should be kept out of possession after the expiration of the term by forfeiture, *held*, the double rent reserved was not a penalty, but estimated or liquidated damages. *Id.*

LANDLORD AND TENANT—(*Continued.*)

3. Acceptance of rent by a lessor, after the lessee had committed a breach of his covenants, such as would authorize the lessor to declare a forfeiture, would not be a waiver of the forfeiture if the lessor was ignorant of such breach at the time of the acceptance of rent. *Id.*
4. If a person, already in possession of premises as tenant, verbally contract with the owner for a new term, his mere continuance in possession after the making of the alleged contract is not an act of part performance such as will justify a decree for the specific enforcement of the verbal contract. *Spalding v. Conzelman*, 177.
5. In order that improvements made by a tenant continuing in possession under such circumstances may be entitled to much consideration, as bearing upon his right to a decree for a specific performance, they should be of such marked and important character as not to be naturally reconcilable with the continuance of the old relation. *Id.*
6. If a landlord sells the leased premises to another, the defendant is not thereby discharged of his obligation to pay rent to the vendor, unless the vendee give him notice that he claims the rent. *Gray v. Rogers*, 258.

## LANDS AND LAND TITLES.

## See ALLUVION. TRESPASS.

1. By the Spanish law a person might divest himself of title to his immovable estate by abandoning it; should he depart from it with the intention that it should be no longer his, this would constitute an abandonment. The question of abandonment is one of fact, of intent, to be determined by the jury from all the circumstances of the case. *Fine v. Public Schools*, 166.
2. To establish a title to land by virtue of a confirmation by the act of Congress of June 13, 1812, it is not necessary to show any documentary title, or any permission to occupy, or any other title emanating from the Spanish government; proof of inhabitation, cultivation or possession is sufficient. *Id.*
3. It would be improper in an instruction to indicate to the jury that, in a case where the claim of the party was based upon possession and cultivation alone, testimony of less weight would be sufficient to make out an abandonment, than in a case where the claim was evidenced by a documentary title of some kind emanating from the Spanish government. *Id.*
4. In the case of a confirmation under the act of Congress of March 3, 1807, where the confirmation is accompanied with the condition that the land confirmed should be surveyed, such survey, when made by the proper executive officers of the United States government, conclusively settles the question of the locality of the tract confirmed, and the courts of equity as well as law can not locate the tract elsewhere. *Magwire v. Tyler*, 202.
5. In the year 1766, the French commandant at the post of St. Louis granted and conceded to Pierre François DeVolsey a lot of ground in said village, of two hundred and forty feet front on the side of the Mississippi and fronting thereto (du côté du Mississippi et y faisant face),

## LANDS AND LAND TITLES—(Continued.)

by three hundred feet in depth on the side of the woods (du côté du bois), having said front upon the grand (or main) street (tenant la dite face et par devant la grande rue,) in the rear another main street (une autre grande rue), &c. The concession was bounded on the sides also by streets. *Held*, that the concession did not constitute the grantee a riparian proprietor; that the concession was bounded by the street in front and not by the river; that neither he nor his grantees would be entitled to alluvion formed in front of the street. *Smith v. St. Louis Public Schools*, 290.

## LIEN.

See MECHANICS' LIEN.

1. Raftsmen engaged as such on the Mississippi river have, in the absence of any special limitations on their rights, a lien on rafts in their charge to secure the compensation due them as raftsmen. *Farrington v. Meek*, 578.
2. Certain persons as raftsmen engaged at certain rates to run certain rafts from a point in the state of Wisconsin to any point on the Mississippi river between Dubuque and St. Louis that might be designated. The special agreement contained this further stipulation, that "the parties of the first part will furnish money enough to pay off the men within twenty-four hours after the delivery of the said lumber to market; the balance of the money to be paid after the lumber is sold and estimated or measured." *Held*, that the raftsmen had a lien upon the rafts for an amount sufficient to pay off at the point of destination the men employed by them; that the special contract overthrew the lien of the raftsmen only for so much of the contract price of transportation as exceeded the sum necessary to pay off the hands at the place of delivery. *Id.*

## LIMITATION.

1. In order to make a continuous adverse possession in successive occupants, so as to enable an occupant of land to avail himself of the possession of a preceding occupant, there should be some privity between them; the entry of the succeeding occupant must be with the consent of his predecessor, evidenced by contract, or by an act of the law passing the estate from the latter to the former. *Shaw v. Nicholay*, 99.
2. A. died in possession of and claiming title to a block of ground, and devised the same to his widow. Paramount title to said block was in B. The widow, who, with another, were appointed executrix and executor of the will, made a compromise with B.—said widow and her co-executor conveying to B. one-half of the block, and B. conveying to the widow the other half. The probate court granted its consent to the making of this compromise on the application of the co-executor. Afterwards an order of sale was made by the probate court, and the widow and her co-executor sold and conveyed to C. all the right, title and interest which A. had in and to that portion of said block quit-claimed by B. to the widow of A. This sale was made for the payment of debts. After the death of A. the widow remained in possession

## LIMITATION—(Continued.)

- of said ground up to the sale to C. *Held*, that the possession of A. was an interest in said block; that the widow, under the circumstances, could do no act by which the rights of creditors would be prejudiced; that she could not defeat the estate provided for the payment of debts, which would be done by annexing her possession as devisee to the title acquired from B.; that the sale by the executors to C. transferred the possession held by the devisee under the will, and that C., in making out a defence to an ejectment by the widow founded on the title acquired by her by virtue of the compromise with B., might connect his possession after the executors' sale with the possession of the widow previous to and after the compromise, and with that of A. previous to his death. *Id.*
3. The character of a disseisin as between tenants in common is different from that of a disseisin as against strangers. This distinction is founded on the presumption that a person, who enters into possession of a tract of land having a title thereto, enters in conformity thereto; *prima facie* the entry of one tenant in common is not adverse to his co-tenants, but in support of the common title; his possession and seisin are the possession and seisin of his co-tenants. *Warfield v. Lindell*, 272.
  4. One tenant in common may disseise or oust his co-tenants. To constitute an adverse possession by one tenant in common as against his co-tenants, an actual ouster, or "turning out by the heels," is not necessary; there must, however, be some notorious and unequivocal act asserting an entire ownership. *Id.*
  5. Whether this assertion of an entire ownership must be brought home to the actual knowledge of the co-tenants depends upon the character of such act of assertion. If it be a verbal assertion or declaration of entire ownership, it can be of no avail to establish an adverse possession unless brought home to the knowledge of the co-tenants. *Id.*
  6. When, however, the act asserting an entire ownership is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it does not devolve upon the possessor to show that actual notice was given to the co-tenant or to prove a probable actual knowledge on his part; it is sufficient if the act is overt and notorious; if, in such case, the co-tenant is ignorant of his rights, or neglects them, he must bear the consequences. *Id.*
  7. A possession of land by a tenant in common for twenty-six years, and an exclusive receipt by him of the rents and profits, without any account rendered or any demand made, would not of themselves raise a legal presumption of ouster by such tenant in common of his co-tenants. *Id.*
  8. The actual possession of a part of a tract of land by the rightful owner carries with it the constructive legal possession and seisin of the whole tract so far as the same is not actually occupied adversely by another. *Schultz v. Lindell*, 310.
  9. Where, however, the true owner of a tract of land is not in the actual possession of any portion of such tract, the actual possession of a part

LIMITATION—(*Continued.*)

of the same by another, who is in such possession under a colorable title to the whole, will carry with it a constructive possession of the whole tract as against such true owner. *Id.*

10. Where a large tract embraces and includes several smaller tracts, an actual possession by the owner of the large tract of a small portion of the same outside of one of the smaller tracts included in it will not be construed to be a constructive adverse possession of such smaller tract against the true owner thereof, although the latter may not be in the actual possession of any portion of his tract. *Id.*

## LIS PENDENS.

See PRACTICE, 39.

1. *Quere*, whether the doctrine of *lis pendens* is applicable to movable personal property. *McLaurine v. Monroe's Adm'r*, 462.

## M

## MANDAMUS.

1. If the error complained of in the proceedings of an inferior court can be redressed on appeal or writ of error, a mandamus will be refused by the supreme court. *Bleeker v. St. Louis Law Commissioner's Court*, 111.
2. Questions of jurisdiction as between the several courts of St. Louis county may be determined by the supreme court on appeal or writ of error. *Id.*

## MARRIAGE.

1. Among the savage tribes of North American Indians marriage is merely a natural contract, and neither law, custom nor religion has affixed any conditions, limitations or forms other than those which nature herself has prescribed. *Johnson v. Johnson's Adm'r*, 72.
2. Permanency is not to be regarded as an essential element of marriage by the law of nature; otherwise all such connections as have taken place among the various tribes of the North American Indians—either between persons of pure Indian blood, or between half breeds, or between the white and Indian races—must be regarded as illicit and the offspring illegitimate; for it is well established that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure. The power of divorce in one or both of the parties to a contract of marriage, at his or her pleasure, is not inconsistent with the law of nature. *Id.*
3. A mere casual commerce between the sexes does not constitute a marriage by the law of nature; but where there is a cohabitation by consent, for an indefinite period of time, for the procreation and bringing up of children, that, in the state of nature, would be a marriage. *Id.*
4. It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere. *Id.*
5. Where the legitimacy of children is called in question, especially after their death, and after a great lapse of time, every reasonable presump-

**MARRIAGE.**—(Continued.)

- tion should be indulged in in favor of legitimacy; very slight circumstances are sufficient to authorize a court or jury to find the existence of a marriage. *Johnson v. Johnson's Adm'r*, 73.
6. By the statute law of this state "the issue of all marriages deemed null in law, or dissolved by divorce, shall be legitimate;" (R. C. 1845, 1855, tit. Descents and Distributions;) hence, upon an issue of legitimacy, the inquiry is limited to the mere fact of a marriage *de facto* and in this investigation the jury are bound to make every intendment in favor of the legitimacy of the children not necessarily excluded by the proof. *Id.*
7. Where a white man, living in the Indian country, introduced an Indian woman into his family, cohabited with her and became the father of children by her, assumed and discharged parental duties toward those children, provided liberally for their education, introduced them into his household upon his subsequent marriage with another woman, secured their recognition in the social circle in which he moved, and their marriage as his daughters, made liberal provision for them in his will, and solemnly recognized them as his children in that instrument—no question being made as to their legitimacy during the life of the father—*held*, that all these circumstances constituted presumptive evidence of a marriage with the Indian woman, when its existence was questioned nearly fifty years after it is alleged to have taken place, when two of the children were dead leaving heirs, and the father also died without leaving any other children. *Held*, further, that the fact, that after cohabiting with the Indian for years, the white man separated from her and sent her back to her tribe, could have no tendency to overthrow the presumption of a marriage arising from the previous cohabitation and other circumstances, if such separation and sending away were consistent with the usages among the Indians, not only in reference to their own marriages, but to intermarriages with the traders who sojourned with them. It is a right conceded to the husband by the terms of the contract, and its exercise can not therefore be regarded as inconsistent with it. *Id.*

**MARSHAL.**

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

**MEASURE OF DAMAGES.**

See DAMAGES.

**MECHANICS' LIEN.**

1. If a contractor, who has furnished materials for, and expended work and labor upon, the construction of a building for another, receives from the latter a promissory note for the sum due, payable at a time beyond the expiration of the period within which he must file his lien under the act with respect to mechanics' liens, but within the period within which suit must be commenced, if at all, to enforce the lien, he will not thereby have waived his right to file his lien or to enforce the same against the building; he merely suspends his right of action. The filing of the lien is not the bringing of a suit. *McMurray v. Taylor*, 264.

MINISTERIAL ACTS.

See JUSTICES' COURTS.

MORTGAGES.

See VENDORS AND PURCHASERS.

1. The sixth section of the act concerning the foreclosure of mortgages (R. C. 1855, p. 1089) allows persons, claiming an interest in the mortgaged property, to be made parties defendant, on motion, in suits for foreclosure, only with a view to the protection of their own interests. It was not designed thereby that a third party should be let into the suit with a view to the protection of the interests of the necessary parties. Such third party must show that some injustice would be done to him by letting judgment go against the other parties. *Wall v. Nay*, 494.

MUNICIPAL CORPORATIONS.

See BANKS. TAXATION.

P

PARIS, TOWN OF.

See TAXATION, 7.

PARTITION.

1. Infants can not appear by attorney as parties plaintiff in actions for partition; they must sue by guardian. *Fulbright v. Canefox*, 425.
2. Judgments rendered in proceedings where infants appear by attorney are not nullities as to them; they are voidable, and may be set aside on terms. *Id.*
3. It is the duty of the court, in proceedings for partition, to see that all the title of the parties to the suit is conveyed by the judgment. Hence, where in proceedings for partition one of the plaintiffs, an infant, appeared by attorney, and the sheriff afterwards instituted suit on a note given to him by a purchaser at the partition sale, who defended on the ground that the judgment in partition was invalid as to such minor, who had since become of age; *held*, that, before compelling the purchaser to pay the note given for the land purchased at the partition, it would be proper that the question as to the acquiescence of such minor in the partition judgment and sale should be satisfactorily settled. *Id.*

PARTNERSHIP.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An incoming partner is not liable for debts contracted before he enters the partnership; nor can his co-partner render him liable for such previously contracted debts by giving a note therefor in the partnership name. The incoming partner may, by his agreement, become liable for such debts, and the new firm may, with the consent of the creditors, novate such debts. *Fagan v. Long*, 222.

PAYMENT AND SATISFACTION.

1. The taking of a promissory note does not extinguish an open account; upon the production of the note a recovery may be had on the account. *McMurray v. Taylor*, 263.

## PAYMENT AND SATISFACTION—(Continued.)

2. Where a note has been taken for an indebtedness evidenced by open account, and a receipt given therefor, a statement in the receipt to the effect that the note was taken "in settlement of the account" would not be sufficient, alone, to authorize the court to submit to the jury, by instruction, the issue whether the note was taken in payment or satisfaction of the account. *Id.*
3. Where there is a right of action against several, a mere judgment against one without satisfaction is no discharge of the others. *McLaurine v. Monroe's Adm'r*, 462.

## PLEADING.

See AGREEMENT, 3. BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

1. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take the same by demurrer or answer. *Ivory v. Carlin*, 142; *Molony v. Boernstein*, 144.
2. Where several causes of action are embraced in the same petition, they should be separately stated. *Linville v. Harrison*, 228.
3. To enable a defendant to avail himself of a want of demand on the part of the plaintiff of a sum of money claimed to be due, the defendant should set up the matter in his answer, and accompany the same with a tender of the amount due; in which case, if the plaintiff will further prosecute his suit, and shall not recover a greater sum than is tendered, he shall pay all costs. (R. C. 1855, p. 448.) *Westcott v. DeMontreville*, 252.
4. Nothing can be set up as a counter-claim, which is not a cause of action, a cross demand, and that does not contain the substance necessary to sustain an action by defendant against the plaintiff, if the plaintiff had not sued the defendant. *McPherson v. Meek*, 345.
5. A person with whom a contract is entered into for the benefit of another may sue in his own name in enforcement of such contract without joining with him such other person; he is a trustee of an express trust within the meaning of the second section of the second article of the practice act. (R. C. 1855, p. 1217.) He may, or may not, join the beneficiary as a party in the suit. *Wright v. Tingley*, 389.
6. In order that a third party, not an original party to a suit, may be permitted to come in and set up his claim to the subject matter in controversy or his defence, it is not required that he should be a necessary party. *Carter v. Mills*, 432.

## POSSESSION.

See LIMITATION. ESTOPPEL.

## PRACTICE.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES. ATTACHMENT. CRIMES AND PUNISHMENTS. JUSTICES' COURTS.

1. The admission of testimony that is merely irrelevant, and which could not have influenced the jury in forming their verdict, is no ground for the reversal of a judgment by the supreme court. *Picker v. Haidorn*, 92.
2. If the error complained of in the proceedings of an inferior court can

## PRACTICE—(Continued.)

- be redressed on appeal or writ of error, a mandamus will be refused by the supreme court. *Bleeker v. St. Louis Law Commissioner's Court*, 111.
3. Questions of jurisdiction as between the several courts of St. Louis county may be determined by the supreme court on appeal or writ of error. *Id.*
  4. All the proceedings of a court of record are in the breast of the court during the term at which they are had, and may be modified or set aside; hence it is not regular, without leave of court, to take a transcript of such proceedings to be filed in the office of the clerk of the supreme court before the expiration of the term of the inferior court at which such proceedings are had; an appellant will not be in default who fails to file such transcript in the office of the clerk of the supreme court before the expiration of such term of the inferior court. *Truesdail v. Sanderson*, 113.
  5. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take the same by demurrer or answer. *Ivory v. Carlin*, 142.
  6. When a case has been retried in an inferior court according to the principles laid down in the decision of the supreme court, none of the questions, which were decided when the case was first in the supreme court, should be open for re-examination on a second writ of error or appeal, unless some general principle of law has been manifestly decided incorrectly the first time, or injustice to the rights of the parties would be done by adhering to the first opinion. *Chambers' Adm'r v. Smith's Adm'r*, 166.
  7. The inhabitants of the city of St. Louis are incompetent jurors in a case in which the city is interested as party; for example, in a case in which the Board of President and Directors of the St. Louis Public Schools is a party. In such case the court should disregard the special act of March 5, 1855, (Sess. Acts, 1855, p. 527,) and direct the summoning, by special venire, of a jury from that portion of the county outside of the city limits. *Fine v. St. Louis Public Schools*, 166.
  8. The provision of the act regulating executions (R. C. 1845, p. 481, § 28,) directing the sheriff to divide real estate levied on and sell so much thereof as will be sufficient to satisfy the execution, is directory; a violation of its injunctions will not render the sale void. *Id.*
  9. An instruction given to a jury is erroneous if it is calculated to mislead them by inducing them to attach undue importance to a portion of the testimony and to divert their attention from other facts entitled to consideration. Instructions should not amount to a commentary on the evidence. *Id.*
  10. Where the instructions given to the jury fully state the law applicable to the facts, the refusal of other instructions asked will not be error, although such instructions may be correct. *Bay v. Sullivan*, 191.
  11. Instructions are calculated to mislead and are erroneous which place the case before the jury upon a portion of the facts only, and which, in effect, restrict the issue, and exclude from the consideration of the jury questions that must be passed upon. *Mead v. Brotherton*, 201.
  12. Where in an attachment suit the defendant files a plea in the nature

## PRACTICE—(Continued.)

- of a plea in abatement putting in issue the truth of the facts alleged in the plaintiff's affidavit, and the issue raised by this plea is found for the plaintiff, the defendant should be allowed time, if he ask it, without terms, to file an answer in bar of the action. *Bourgoin v. Wheaton*, 215.
13. Though amendments should be liberally allowed in furtherance of justice, yet the discretion of the inferior courts will not be controlled by the supreme court unless it has been manifestly abused. *Dozier v. Jer-man*, 216.
  14. Where a defendant prays the court on the trial to be allowed to amend his answer, and the court refuses to grant the motion, but allows the defendant to introduce evidence in support of the issue raised by the proposed amendment, and fully submits said issue to the jury by the instructions given, the discretion of the court in the allowance of amendments is not abused. *Id.*
  15. A party wishing to avail himself of error in the giving or refusing of instructions must take his exception at the time they are given or refused; it is too late to make his objections for the first time on a motion for a new trial. *Id.*
  16. It is discretionary with the courts to relax the rules of evidence as to the order of examining witnesses or introducing testimony; material testimony should not be excluded because offered after the testimony is closed, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. *Id.*
  17. Wherever the jury is authorized, in a case of unliquidated damages, to allow interest in estimating the damages, the interest is not recoverable as such in addition to the damages assessed by the jury, but must enter into the estimate made by the jury and be found as a part of the damages assessed. *Id.*
  18. A party to a suit is entitled to examine as a witness any of the adverse parties thereto. (R. C. 1855, p. 1577, § 3.) *Fagan v. Long*, 222.
  19. Where one of two defendants does not join in an appeal from a justice of the peace, the appellate court may, on proper motion, order a severance. *Id.*
  20. By the act of February 12, 1857, (Sess. Acts, 1857, p. 181,) "a party may be examined as a witness in behalf of his co-plaintiff or of a co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. *Garnier v. Lebeau*, 229.
  21. Where a continuance was applied for in behalf of several defendants in a cause on the ground of the absence of a co-defendant alleged to be a material witness in their behalf; held, that the motion was properly overruled on the ground that it did not appear, but that all the defendants were interested in the defence which the testimony of the said co-defendant was expected to support. *Id.*
  22. Where the defence relied upon is a joint defence, upon which all the defendants rely, one defendant can not be permitted, under the act of February 12, 1857, (Sess. Acts, 1857, p. 181,) to testify in behalf of his co-defendants. *Scheifer v. Kahlman*, 232.

## PRACTICE—(Continued.)

23. The supreme court will not grant new trials on the ground that the verdicts are against the weight of evidence. *Rider v. Springmeyer*, 234.
24. A cause was set for trial on the 6th of May, 1858; on the 5th of May the defendant issued subpoenas for witnesses; these subpoenas were returned by the sheriff "not found;" on the 6th the case was called for trial, but was not tried; on the 7th it was again called, whereupon the defendant filed a motion for a continuance on the ground of the absence of material witnesses, accompanying said motion with an affidavit in which he set forth that when he discovered on the 6th day of May that the subpoenas had been returned "not found," he searched for said witnesses and used his best endeavors to find them and procure their attendance. The court overruled the motion. *Held*, that the motion was properly overruled. *Evans v. Pond*, 235.
25. A. brought an action for assault and battery against B. B. demurred to the petition. The demurrer was overruled, a default taken, and an assessment of damages had and judgment rendered therefor. B. moved the court to set aside the judgment on the ground that plaintiff's counsel had taken judgment by default in violation of an agreement entered into by him with defendant's counsel not to take action in the cause during the temporary absence of the latter. This motion was overruled. The defendant appealed to the supreme court. Pending this appeal the plaintiff died and his administrator was substituted. *Held*, that under such circumstances, the supreme court would not reverse, as a reversal would be equivalent to a dismissal of the suit. *Marguard v. Richter*, 248.
26. To enable a defendant to avail himself of a want of demand on the part of the plaintiff of a sum of money claimed to be due, the defendant should set up the matter in his answer, and accompany the same with a tender of the amount due; in which case, if the plaintiff will further prosecute his suit, and shall not recover a greater sum than is tendered, he shall pay all costs. (R. C. 1855, p. 448.) *Westcott v. DeMontreville*, 252.
27. The supreme court will not grant new trials on the ground that the verdicts are against the evidence. *McLean's Adm'r v. Bragg*, 262.
28. Where property is conveyed in trust, *bona fide*, to secure the payment of certain debts due, and a third person, by virtue of a sale under a judgment against the grantor in the deed of trust, subsequently obtains title, subject to such deed of trust, to a portion of the property embraced in said deed, such purchaser will not be entitled to intervene in proceedings instituted to enforce the deed of trust against all the property embraced in it, and to require that that part of the property in which he has no interest shall first be appropriated to the payment of the trust debt. *Fleshman v. Shepard*, 324.
29. Where it was the uniform practice of a circuit court not to try cases reversed and remanded by the supreme court at the first term next after such reversal, *held*, that it was no error to continue such cause at such term. *McNeeley v. Hunton*, 332.
30. No dismissal of a suit as to a party thereto should be allowed, when it will produce derangement in the rights of the defendants, deprive them

## PRACTICE—(Continued.)

of a legal defence, or subject them to increased difficulties or liabilities. *Browning v. Chrisman*, 353.

31. In equity there may be a decree against one defendant in favor of a co-defendant. *Id.*
32. B. conveyed certain real estate to D. with covenants of warranty. D. instituted an action of ejectment against C. to recover possession thereof. C. set up in his answer as a defence to this action a prior purchase by himself of said real estate from B.; that he had taken possession and paid a portion of the purchase money; that B. had executed a deed of said real estate to him, but fraudulently refused to deliver it; that D., fraudulently contriving and confederating with B., obtained a deed from the latter. C. offered to pay the remainder of the purchase money, and prayed for a decree of title against D. and B.; that B. be made a party to the action; and that an order of publication be made against B., he being a non-resident. An order of publication was made against B. The court, by its decree, vested the title to the real estate in controversy in C., annulled the deed of B. to D., and decreed that C. should pay to B. the balance of the purchase money, and gave judgment against B. and D. for costs. Afterwards B. presented a petition to the court, under the provisions of the thirtieth article of the practice act of 1849, (Sess. Acts, 1849, p. 103, § 8—11,) praying the court to set aside the decree, and for leave to file an answer. This motion was accompanied by an affidavit denying specifically the allegations contained in the answer of C. The court granted leave to B. to file an answer; which leave was acted upon by the latter. Afterwards C. filed a motion setting forth that the original action of D. against him was an action of ejectment; that he, C., set up an equitable defence praying for a decree of title and that B. might be made a party; that he was accordingly made a party and a decree rendered in favor of C.; that said B. was not and is not a necessary party; and praying the court to set aside the judgment or decree as to said B. and strike his name out as a party, leaving the judgment in full force against D. The court sustained the motion, and the judgment rendered in the suit of D. against C. and B. was set aside as to B., the court directing that the case should be "left open for B. to pursue any remedy he may have against C., as though he had never been a party to the original suit of ejectment instituted" by D. against C. The court dismissed the petition. *Held*, that this action of the court was erroneous; that B. would be injuriously affected by the decree, his deed to D. being a deed with covenants of warranty; that B. had a right to come in and plead to the original action. *Id.*
33. Infants can not appear by attorney as parties plaintiff in actions for partition; they must sue by guardian. *Fulbright v. Canefox*, 425.
34. Judgments rendered in proceedings where infants appear by attorney are not nullities as to them; they are voidable, and may be set aside on terms. *Id.*
35. It is the duty of the court, in proceedings for partition, to see that all the title of the parties to the suit is conveyed by the judgment. Hence, where in proceedings for partition one of the plaintiffs, an infant, ap-

## PRACTICE—(Continued.)

- peared by attorney, and the sheriff afterwards instituted suit on a note given to him by a purchaser at the partition sale, who defended on the ground that the judgment in partition was invalid as to such minor, who had since become of age; *held*, that, before compelling the purchaser to pay the note given for the land purchased at the partition, it would be proper that the question as to the acquiescence of such minor in the partition judgment and sale should be satisfactorily settled. *Id.*
36. In suits for the possession of personal property, under the eighth article of the practice act of 1849 (Sess. Acts, 1849, p. 82,) if the defendant gave a forthcoming bond, as allowed by said article, with sureties, judgment could be rendered against the sureties only in the mode pointed out in the ninth section of said article. *Baldwin v. Dillon*, 429.
37. In order that a third party, not an original party to a suit, may be permitted to come in and set up his claim to the subject matter in controversy or his defence, it is not required that he should be a necessary party. *Carter v. Mills*, 432.
38. Where a party seeks the specific enforcement of a contract to convey land, and a third person, not a party to such suit as originally instituted, who claims the same land by an alleged superior title under the person against whom such specific enforcement is sought, desires to be made a party, he may well be permitted to come in and defend; if a decree as between the original parties to the suit would affect his rights injuriously—as by casting a shadow on his title—he would have a right to be heard. *Id.*
39. One M., residing in the year 1856 in the state of California, owned certain lots adjoining the city of St. Joseph, Missouri. He had in St. Joseph an agent authorized to sell said lots for a specific sum. An uncle of M., a surgeon in the United States army, stationed at Fort Columbus, New York harbor, was also made acquainted with his wish to dispose of said lots. An offer by one G. to purchase said lots was transmitted through said uncle to M. in California. M. thereupon executed a deed dated in California, October 6, 1856, conveying said lots to G., and forwarded the same by mail to the uncle at Fort Columbus, where it was received by him about December 1, 1856, and immediately handed over to Gibbs upon his paying the purchase money. In the mean time, the agent of M. at St. Joseph had, on the 20th of October, 1856, in good faith, entered into a written contract to sell said lots to one C. C., on the 29th of Nov'r, 1856, instituted a suit against M. for the specific enforcement of this contract. M., being a nonresident, was notified by publication, but made default. G., on his own motion, was admitted to defend, against the objection of the plaintiff. *Held*, that G. was, under the circumstances, properly admitted to defend; that having the legal title and a prior equity—the acceptance of the offer of G. being prior to the contract with C.—his title would prevail over the naked agreement to convey to C. *Id.*
40. An order of publication against absent defendants does not operate as notice to purchasers until it is executed. *Id.*

## PRACTICE—(Continued.)

41. The sixth section of the act concerning the foreclosure of mortgages (R. C. 1855, p. 1089) allows persons, claiming an interest in the mortgaged property, to be made parties defendant, on motion, in suits for foreclosure, only with a view to the protection of their own interests. It was not designed thereby that a third party should be let into the suit with a view to the protection of the interests of the necessary parties. Such third party must show that some injustice would be done to him by letting judgment go against the other parties. *Wall v. Nay*, 494.
42. A person is not entitled to the reversal by the supreme court of a judgment for error committed against another. *Id.*
43. Exceptions to the giving or refusing of instructions should be taken at the time of the ruling of the court; the instructions should be incorporated in the bill of exceptions. *Thompson v. Russell*, 498.
44. The supreme court will not grant new trials on the ground that the verdicts are against the weight of evidence. *Id.*
45. Where illegal testimony is introduced without objection, and the party introducing the same asks an instruction based upon it, the court may properly refuse to grant it. *Weaver v. Hendrick*, 502.
46. The supreme court will not grant a new trial on the ground that an instruction unsupported by the testimony was given, unless the giving of such instruction was calculated to mislead the jury. *Anderson v. Kincheloe*, 520.
47. Courts should not give instructions amounting to a comment on the testimony, nor instructions calculated to mislead the jury by inducing them to attach undue importance to a portion only of the testimony, and to divert their attention from other facts entitled to consideration. *Id.*
48. Where a surprise of a party on the trial of a cause results from a want of diligence on his part—as where he is surprised by the testimony of his own witness, from whom he had sought no information previous to the trial—the court will not be warranted in granting a new trial on the ground of surprise; the court should also be satisfied that the injury sustained could probably be repaired on a second trial. *O'Conner v. Duff*, 595.
49. Courts should not confuse juries by instructing at too great length. *Vaughn v. Scade*, 600.

## PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

## See CRIMES AND PUNISHMENTS.

1. It is the right and privilege of a jury in a criminal prosecution to determine the facts submitted to them for decision without regard to and uninfluenced by the opinion the judge presiding at the trial may have as to the facts; the judge can not refuse to receive a verdict returned by the jury on the ground that it is manifestly against the evidence. *The State v. Ostrander*, 13.
2. If the verdict returned by a jury in a criminal prosecution be sensible and responsive to the issue, it is the duty of the court to receive it and have it recorded. *Id.*

## PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(Continued.)

3. An affirmative verdict of guilty of murder in the second degree is responsive to an indictment for murder in the first degree; and however strong may be the opinion of the judge that such a verdict is unwarranted by the evidence, and although no instructions whatever may have been given bearing upon the law of murder in the second degree, it would be improper for the judge to refuse to receive such a verdict and order it to be recorded. *Id.*
4. The twenty-first section of the ninth article of the act concerning crimes and their punishments (R. C. 1855, p. 642) is properly invoked by an accused person only after trial and conviction; the accused should be tried as if he were an adult, and afterwards, upon suggestion, the court should ascertain the age, and if he be found to be under sixteen years of age, the court should adjust the punishment in accordance with the statute. *State v. Gavner*, 44.
5. It is discretionary with the court, in the trial of a criminal case, whether the witnesses in attendance shall be separated and ordered to retire so that they may not hear each other's testimony. If such an order be made and be disobeyed, it is, it seems, a matter of discretion with the court whether the disobedient witness shall be examined or not; it is not error to permit him to be examined. *State v. Fitzsimmons*, 236.
6. A motion to quash a *scire facias* upon a forfeited recognizance should not be sustained, if sufficient appear upon the entries and files of the court to entitle the State to an award of execution. *State v. Littlepage*, 322.
7. Grand jurors may indict on their own information or knowledge; they may indict a person for perjury in testifying before themselves. *State v. Terry*, 368.
8. The concluding clause of the twenty-seventh section of the fourth article of the act regulating proceedings in criminal cases, (R. C. 1855, p. 1176, § 27,) providing that no indictment shall be deemed invalid, nor the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits," should, at least, be limited in its application to imperfections of the class previously enumerated in said section. *State v. Pemberton*, 376.
9. Where a person is indicted for a felonious assault and is acquitted, the acquittal is a bar to any further proceedings; an appeal can not be prosecuted to the supreme court by the State. *State v. Palmer*, 385.
10. The validity of a recognizance entered into by a party for his appearance to answer an indictment can not be determined upon a motion to quash the same; but only upon *scire facias* after forfeiture. *State v. Hopkins*, 404.

## PRINCIPAL AND AGENT.

## See TORTS.

1. Where a public agent, in the character of such agent, acknowledges a liability—as where the president of a board of trustees of a school dis-

## PRINCIPAL AND AGENT—(Continued.)

- trict, as trustee, promises, on behalf of such trustees, by a written promissory note, to pay a liability incurred for the building of a school-house—such agent is not personally liable. *Hodges v. Runyan*, 491.
2. To constitute a person a trespasser in the wrongful seizure and removal of the property of another, it is not necessary that he should actually participate in the act of seizing and removing; if he directs or assents to the trespass—as by directing the sheriff to levy an execution upon such property—he is liable as a trespasser. *McNeeley v. Hunton*, 332.
  3. He who, knowing that he has no right to the possession of property, withholds the possession thereof from the true owner, who had wrongfully been deprived of the same, may be supposed to have assented to the wrongful act by which such possession was obtained. *Anderson v. Kincheloe*, 520.

## PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## R

## RAILROADS.

See TORTS.

1. If horses or animals are killed or injured by the cars, locomotives or other carriages used on a railroad, and the accident does not occur at a crossing of a highway or on a portion of the road enclosed by a fence, the railroad company will be liable for such injury, under the fifth section of the act approved December 12, 1855, (R. C. 1855, p. 649,) irrespective of any question of negligence, unskilfulness or misconduct on the part of the officers, servants, or agents of such company. *Burton v. North Missouri Railroad Co.*, 312.
2. This liability extends to railroad companies, whether the fifty-second section of the general railroad act (R. C. 1855, p. 437) applies to such road or not. *Id.*
3. Justices of the peace have jurisdiction of actions brought by laborers against railroad corporations under the twelfth section of the general railroad act. (R. C. 1855, p. 414.) *Grannahan v. Hannibal & St. Joseph Railroad Co.*, 546.
4. The twelfth section of the general railroad act is constitutional in its application to railroad corporations previously created. *Id.*
5. Although a contractor under a railroad company may sublet to another, and bind such sub contractor not to give out his contract to another, yet if such sub-contractor should violate this agreement and give out the contract to another, a laborer under the latter could maintain an action under the twelfth section of the general railroad act against the railroad company. *Id.*
6. The exemption of the stock of the Hannibal and St. Joseph Railroad Company from all state and county taxes, contained in the original charter of said company, is modified by the acceptance on the part of

RAILROADS—(*Continued.*)

said company of the act of September 20, 1852; (Railroad Laws, p. 115; Sess. Acts, 1853, p. 15;) and the corporate property of said company, although representing the stock, is subject to taxation at the time and in the manner specifically provided for in the third section of said last mentioned act. *Hannibal and St. Joseph Railroad Co. v. Shacklett*, 550.

7. The road-bed, machinery and depots of the Hannibal and St. Joseph Railroad, and the other property used by said company in operating its road, are to be considered as part of and represented by the capital stock of said company, and are not liable to taxation under that provision of the general revenue law subjecting to taxation "all property owned by incorporated companies over and above their capital stock." (R. C. 1855, p. 1322.) *Id.*

## RECOGNIZANCE.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

## REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

## RES ADJUDICATA.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 9.

1. When a case has been retried in an inferior court according to the principles laid down in the decision of the supreme court, none of the questions, which were decided when the case was first in the supreme court, should be open for re-examination on a second writ of error or appeal, unless some general principle of law has been manifestly decided incorrectly the first time, or injustice to the rights of the parties would be done by adhering to the first opinion. *Chambers' Adm'r v. Smith's Administrator*, 156.

## RIPARIAN RIGHTS.

See ALLUVION.

## S

## SALE.

See VENDORS AND PURCHASERS.

## SHERIFF.

See EXECUTION. JURORS. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In order to make a sheriff responsible for a failure to levy an execution, it must be shown that he had knowledge of property owned by the execution debtor subject to execution, and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find the property. *Taylor v. Wimer*, 116.

## SLANDER.

1. In ordinary actions for slander, where the words spoken are actionable in themselves, malice is implied; no express averment is, in such case, necessary to maintain the action. *Weaver v. Hendrick*, 502.

## SLANDER—(Continued.)

2. Where, however, the words are spoken in the discharge of some public or private duty, or in the exercise of some right, express malice must be shown. *Id.*
3. Any circumstances disproving, or tending to disprove, malice are admissible in mitigation of damages. *Id.*

## SLAVERY.

1. An executory contract entered into by a master with his slave, by which the former agrees to manumit the latter upon the payment of a certain sum of money, is void and incapable of enforcement. *Redmond v. Murray*, 570.
2. Slaves can be emancipated within this state only in the mode prescribed by statute. *Id.*

## SPANISH LAW.

See LANDS AND LAND TITLES.

## SPECIFIC PERFORMANCE.

See EQUITY.

1. If a person, already in possession of premises as tenant, verbally contract with the owner for a new term, his mere continuance in possession after the making of the alleged contract is not an act of part performance such as will justify a decree for the specific enforcement of the verbal contract. *Spalding v. Conzelman*, 177.
2. In order that improvements made by a tenant continuing in possession under such circumstances may be entitled to much consideration, as bearing upon his right to a decree for a specific performance, they should be of such marked and important character as not to be naturally reconcilable with the continuance of the old relation. *Id.*
3. An agreement to dispose of property by will in a particular way, if made on a sufficient consideration, is valid and binding. *Wright v. Tinsley*, 389.
4. Although circumstances may render it impossible to specifically enforce such an agreement exactly, yet its substantial specific enforcement will be decreed. *Id.*

## STATUTE OF FRAUDS.

1. A., by verbal agreement, in June, 1856, contracted to sell to B. his crops of hemp for the years 1856 and 1857, for which B. was to pay one hundred dollars per ton. The crop of the year 1856 was delivered to B. and the contract price paid therefor by B. A. offered to deliver to B. under the contract the crop of the second year, 1857; B. refused to receive the same. *Held*, that the contract was within the fifth section of the statute of frauds, not being to be performed within one year from the making thereof; that there was no such performance thereof as would take the case out of the statute; that the statute was a bar to any action, legal or equitable, on such agreement; that A. could not in a suit brought on such agreement, in which the statute of frauds was pleaded as a bar, abandon the special contract sued on, and recover on an implied agreement in the same action. *Atwood's Adm'r v. Fox*, 499.

## STATUTES—CONSTRUED AND EXPLAINED.

- Assignments.*—(R. C. 1855, p. 210, § 39.) *Johnson v. McAllister's assignee*, 327. (See *Pinneo v. Hart*, 561.)
- Attachment.*—(R. C. 1855, p. 254, § 53; p. 242, § 9.) *Henderson v. Drace*, 358. (See *Bourgoin v. Wheaton*, 215.)
- Banks.*—(Sess. Acts, 1857, p. 23, § 44.) *Morrison v. McCartney*, 183. (*Id.* p. 34, § 32.) *City of Lexington v. Aull*, 480. (*Id.* p. 22, § 32.) *Town of Paris v. Farmers' Bank of Missouri*, 575.
- Bills of Exchange and Promissory Notes.*—(R. C. 1855, p. 294, § 7.) *Farrell v. Fritschle*, 190.
- Bonds, Notes and Accounts.*—(R. C. 1855, p. 323, § 6.) *Ivory v. Carlin*, 142; *Molony v. Boernstein*, 144.
- Charter of City of Lexington.*—(Sess. Acts, 1845, p. 161.) *City of Lexington v. Aull*, 480.
- Charter of St. Joseph.*—(Sess. Acts, 1857, Adj. Sess., p. 249.) *City of St. Joseph*, 538.
- Claim and Delivery of Personal Property.*—(R. C. 1855, p. 1242.) *Dilworth v. McKelvy*, 149. (Sess. Acts, 1849, p. 82.) *Baldwin v. Dillon*, 429.
- Costs.*—(R. C. 1855, p. 448, § 34.) *Westcott v. DeMontreville*, 252.
- Crimes and Punishments.*—(R. C. 1855, p. 577, § 31, 32.) *State v. Ramelsburg*, 26. (R. C. 1855, p. 642, § 21.) *State v. Gavner*, 44. (R. C. 1855, p. 591, § 9.) *State v. Fitzsimmons*, 237. (R. C. 1855, p. 630, § 33.) *Kaufman v. Harmon*, 387. (R. C. 1855, p. 567, § 38.) *State v. Thompson*, 470. (R. C. 1855, p. 573, 574, § 16, 19.) *State v. Henley*, 509. (See *The State v. Ostrander*, 13; *State v. Gazell*, 92.)
- Damages.*—(R. C. 1845, p. 649, § 5.) *Burton v. North Missouri Railroad Company*, 372.
- Descents and Distributions.*—(R. C. 1855, p. 661, § 11.) *Johnson v. Johnson's Adm'r*, 72. (R. C. 1845, p. 422, § 10.) *Bent's Administrator v. St. Vrain*, 268.
- Executions.*—(R. C. 1845, p. 481, § 28.) *Fine v. St. Louis Public Schools*, 166.
- Fraud and Fraudulent Conveyances.*—(R. C. 1855, p. 803, § 4.) *Smith v. Hutchings*, 380. (R. C. 1855, p. 804, § 8.) *Johnson v. Jeffries*, 423. (See *Gowan's Adm'r v. Gowan*, 472; *Pinneo v. Hart*, 561.)
- Guardians and Curators.*—(R. C. 1855, p. 826, § 24.) *Brent v. Grace's Administrator*, 253.
- Jurors.*—(Sess. Acts, 1855, p. 527.) *Fine v. St. Louis Public Schools*, 166.
- Justices' Courts.*—(R. C. 1855, p. 925, § 2.) *Ahern v. Carroll*, 200. (R. C. 1855, p. 926, § 3.) *Butler v. Ivie*, 478; *Webb v. Tweedie*, 488. (See *Wertheimer v. Howard*, 420; *Grannahan v. Hannibal and St. Joseph Railroad Company*, 546.)
- Land Laws.*—(Act of Congress of March 3, 1807.) *Magwire v. Tyler*, 202. (See *Smith v. St. Louis Public Schools*, 290.)
- Limitation.*—See *Lindell v. McLaughlin*, 28; *Warfield v. Lindell*, 272; *Schultz v. Lindell*, 310.

STATUTES, CONSTRUED AND EXPLAINED—(*Continued.*)

*Mortgages.*—(R. C. 1855, p. 1089, § 6.) *Wall v. Nay*, 494.

*Practice Acts.*—(R. C. 1855, p. 1223, § 2.) *Linville v. Harrison*, 228. (R. C. 1855, p. 1193, § 23.) *State v. Fitzsimmons*, 237. (R. C. 1855, p. 1217, § 2.) *Wright v. Tinsley*, 389. (See *Garnier v. LeBeau*, 229; *Rider v. Springmeyer*, 234; *Evans v. Pond*, 235; *State v. Fitzsimmons*, 236; *Browning v. Chrisman*, 353; *State v. Williams*, 364; *State v. Terry*, 368.)

*Practice and Proceedings in Criminal Cases.*—(R. C. 1855, p. 1176, § 27.) *State v. Pemberton*, 376.

*Railroads.*—(R. C. 1855, p. 414.) *Grannahan v. Hannibal and St. Joseph Railroad Company*, 546. (Sess. Acts, 1853, p. 15.) *Hannibal and St. Joseph Railroad Company v. Shacklett*, 550.

*Recorders.*—(1 Terr. Laws, p. 543.) *Duly v. Brooks*, 515.

*St. Louis Law Commissioner's Court.*—(R. C. 1855, p. 1597, § 6.) *Vaughn v. Scade*, 600.

*Witnesses.*—(R. C. 1855, p. 1577, § 3.) *Fagan v. Long*, 222. (Sess. Acts, 1857, p. 181.) *Garnier v. Lebeau*, 229; *Scheiffer v. Kahlman*, 232.

## SUNDAY.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 13.

## SURETY.

1. Where a person, alleging that he had as surety for another paid a bond in which the latter was principal, seeks to recover the sum so paid of the alleged principal, he must show that he became a party in the character of surety at the instance of the alleged principal, or that the latter assented to it, unless this fact appear from the instrument itself. *McPherson v. Meek*, 345.

## T

## TAXATION.

1. The City of Lexington was authorized by its charter "to levy and collect taxes upon real and personal property within the city, not exceeding," &c. (Sess. Acts, 1845, p. 161.) The Farmers' Bank of Missouri was incorporated by an act of the general assembly approved March 2, 1857, and established in the city of Lexington. (Sess. Acts, 1857, p. 34.) By the thirty-second section of said act it was provided as follows: "In consideration of the privileges granted by this act to the banks incorporated in this state, each banking company agrees to pay to the state annually one per cent. on the amount of the capital stock paid in by the stockholders other than the state, which shall be in full of all bonus and taxes to be paid to the state by the respective banks." By ordinance shares of stock in incorporated companies (excepting manufacturing companies) were subjected to taxation for city purposes. It was further provided that persons owning shares of stock that were taxable were not required to deliver to the assessor a list thereof, but the president, or other chief officer, of such corporation was required to

## TAXATION—(Continued.)

- deliver to the assessor a list of all shares of stock held therein, and the names of the persons holding the same. For a violation of this provision on the part of such officer by a failure to hand in such a list, the ordinance attached a penalty of one thousand dollars. *Held*, that the Farmers' Bank of Missouri was subject and liable to the tax thus imposed; that the penalty imposed upon the president for a refusal to hand in the required list to the assessor was legal and valid. *City of Lexington v. Aull*, 480.
2. The exemption of the stock of the Hannibal and St. Joseph Railroad Company from all state and county taxes, contained in the original charter of said company, is modified by the acceptance on the part of said company of the act of September 20, 1852; (Railroad Laws, p. 115; Sess. Acts, 1853, p. 15;) and the corporate property of said company, although representing the stock, is subject to taxation at the time and in the manner specifically provided for in the third section of said last mentioned act. *Hannibal & St. Joseph Railroad Co. v. Shacklett*, 550.
  3. The road-bed, machinery and depots of the Hannibal and St. Joseph Railroad, and the other property used by said company in operating its road, are to be considered as part of and represented by the capital stock of said company, and are not liable to taxation under that provision of the general revenue law subjecting to taxation "all property owned by incorporated companies over and above their capital stock." (R. C. 1855, p. 1322.) *Id.*
  4. The general assembly may authorize a municipal corporation to macadamize streets within its limits, and to apportion and charge the cost of such macadamizing on the adjoining lots in proportion to their front. *City of St. Joseph v. Anthony*, 537.
  5. In order to authorize a municipal corporation to recover the amount charged against an adjoining lot on account of the macadamizing of a street, a substantial compliance with the law must be shown; an observance of all the formalities prescribed by the ordinances of the corporation, which are directory, is not required. If the work has been done and in a manner satisfactory to the officer entrusted with its supervision, and has been received by the corporation and paid for, a *prima facie* case is made out. The defendant may show that there has been a neglect of duty on the part of the authorities entrusted with the execution of the work, and if this neglect or omission has injured him, such facts may constitute a defence. *Id.*
  6. By the thirty-second section of the first article of the act of the general assembly concerning banks and banking, approved March 2, 1857, (Sess. Acts, 1857, p. 22,) the banks were exempted from taxation for state purposes alone. The shares of stock in said banks, and the money and notes of other banks in their possession, are subject to taxation for local municipal purposes. *Town of Paris v. Farmers' Bank of Missouri*, 575.
  7. The town of Paris is authorized by its charter to tax for municipal purposes the money and bank notes of the other banks in possession of the branch at Paris of the Farmers' Bank of Missouri. *Id.*



## TENDER.

See PLEADING, 3.

## TORTS.

See PRACTICE, 24. JUSTICES' COURTS, 4, 5. TRESPASS.

1. A servant, who is injured by the negligence or misconduct of his fellow servant, can maintain no action against the master for such injury, unless the servant, by whose negligence the injury is occasioned, is not possessed of ordinary skill and capacity in the business entrusted to them, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. *McDermott v. Pacific Railroad Co.*, 115.
2. A servant of a railway company could not recover against the company for an injury caused by the falling of a bridge, unless such injury was caused by incompetent servants or agents of the company whose employment might be traced to the negligence of the company, or to a defect in the bridge attributable to the fault of the company. *Id.*
3. In order to make a sheriff responsible for a failure to levy an execution, it must be shown that he had knowledge of property owned by the execution debtor subject to execution, and on which he could make the levy, or a knowledge of such facts as should cause him to make exertions to find the property. *Taylor v. Wimer*, 116.
4. To constitute a person a trespasser in the wrongful seizure and removal of the property of another, it is not necessary that he should actually participate in the act of seizing and removing; if he directs or assents to the trespass—as by directing the sheriff to levy an execution upon such property—he is liable as a trespasser. *McNeeley v. Hunton*, 332.
5. If horses or animals are killed or injured by the cars, locomotives or other carriages used on a railroad, and the accident does not occur at a crossing of a highway or on a portion of the road enclosed by a fence, the railroad company will be liable for such injury, under the fifth section of the act approved December 12, 1855, (R. C. 1855, p. 649,) irrespective of any question of negligence, unskillfulness or misconduct on the part of the officers, servants, or agents of such company. *Burton v. North Missouri Railroad Co.*, 372.
6. This liability extends to railroad companies, whether the fifty-second section of the general railroad act (R. C. 1855, p. 437) applies to such road or not. *Id.*

## TRESPASS.

See TORTS. EQUITY, 9.

1. An action to recover damages for trespass to land can be maintained upon possession alone. Where the possession of the plaintiff is admitted, the defendant may put in issue his possessory right, but to sustain such a defence he must show a superior right in himself or in another under whom he claims. If the defendant be a mere intruder he can not; the plaintiff's possession being admitted or proven, show a want of title in the plaintiff. *Reed v. Price*, 442.
2. Where the plaintiff, in an action for trespass to land, claims in his petition ownership and possession, and the possession is admitted or proven,

## TRESPASS—(Continued.)

the defendant, if he be a mere intruder, can not be permitted to introduce evidence to show a want of title in the plaintiff in mitigation of damages. *Id.*

## V

## VENDORS AND PURCHASERS.

See CONVEYANCE. EQUITY. PRACTICE, 38, 39.

1. To entitle a person to invoke the aid of the rule that protects a *bona fide* purchaser as against a prior equity, it must appear that he made his purchase and paid the purchase money before he had knowledge of such prior equity; he should in his answer be full and explicit as to the time and terms of his purchase, and the payment of the purchase money. *Wallace v. Wilson*, 335.
2. The failure of the vendee of a chattel to return or offer to return the same is no bar to an action by such vendee against the vendor on an express warranty of soundness. *Ross v. Barker*, 385.
3. There must be a warranty or fraud to make the vendor of a horse with a secret malady responsible to the purchaser; the purchaser takes the risk of quality and condition, unless he protects himself by a warranty, or there has been fraud on the part of the vendor. *Lindsay v. Davis*, 406.
4. A warranty may be either verbal or written; when it rests upon oral proof, it is a question of intent, and, like any other fact, should be left to the jury. *Id.*
5. A simple affirmation of soundness, or mere expression of opinion, does not constitute a warranty unless it is so intended and understood at the time. *Id.*
6. Where, in a suit to recover damages for a fraudulent representation of soundness, the plaintiff avers in his petition that the disease constituting the unsoundness is glanders, he is bound to prove such allegation; although unnecessary, it is not immaterial when made. *Id.*
7. Although the plaintiff in such case must show that the disease constituting the unsoundness is glanders, yet it is not necessary to show that the defendant knew that the animal sold by him was affected with the alleged form of disease; it is enough that he knew the animal was unsound. *Id.*
8. It is for the jury to determine what constitutes an unsoundness. *Id.*
9. A vendor of land has a lien thereon for the unpaid purchase money. *Davis v. Lamb*, 441.
10. The vendor of an equitable title has a lien for the unpaid purchase money to the same extent as the vendor of the legal title. *Bledsoe v. Games*, 448.
11. Where the vendor of land, who has given a title bond only conditioned for the execution of a deed upon the payment of the purchase money, and who has not executed a deed of conveyance to the purchaser, assigns a note given for the purchase money to another, the equitable lien of the vendor will pass to the assignee and he may enforce the

## VENDORS AND PURCHASERS—(Continued.)

payment of the note against the land specifically. *Adams v. Couchard*, 458.

12. Where the vendor gives merely a bond for the conveyance on the payment of the purchase money, and the vendee sells to another, such purchaser will take subject to the rights of the vendor, without regard to the question whether he had actual notice or not of the vendor's lien. *Id.*

## VOLUNTARY ASSIGNMENTS.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. FRAUD AND FRAUDULENT CONVEYANCES.

## W

## WAIVER.

See MECHANICS' LIEN.

## WARRANTY.

See VENDORS AND PURCHASERS. PRACTICE, 31.

## WILLS AND TESTAMENTS.

1. A testator can not, by devising his lands away, deprive his executor of the power of sale for the payment of debts. *Shaw v. Nicholay*, 99.
2. An agreement to dispose of property by will in a particular way, if made on a sufficient consideration, is valid and binding. *Wright v. Tinsley*, 389.
3. Although circumstances may render it impossible to specifically enforce such an agreement exactly, yet its substantial specific enforcement will be decreed. *Id.*
4. The words "dying without issue" must, in this state, since the revised code of 1845 went into effect, be construed to mean dying without issue living at the death of the person named as ancestor. *Faust's Adm'r v. Birner*, 414.
5. A testator made a bequest as follows: "I direct that if my wife M. should have a child by me, that such child shall have and receive of my estate the sum of two hundred dollars," &c. After making another specific devise, he proceeded as follows: "I give and bequeath to my wife M. all the residue of my estate, real and personal, for and during her natural lifetime," with remainder over. The wife at the death of the testator was pregnant with a child, which was afterwards still-born. *Held*, that the bequest of the two hundred dollars was not a lapsed legacy, but was embraced in the devise to the wife. *Id.*

## WITNESS.

See EVIDENCE.

